Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

GEORGE WASHINGTON,

Petitioner,

v.

JOHN SUMMERVILLE, et al.,

Respondents.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Heck v. Humphrey*, 512 U.S. 477 (1994), defer the accrual of 42 U.S.C. § 1983 claims alleging violations of the Fourth Amendment, where the § 1983 claims are inconsistent with the petitioner's potential criminal conviction?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Seventh Circuit Court of Appeals were George Washington, John Summerville, Patrick Foley, James Capesius and the City of Chicago.

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PETITION FOR WRIT OF CERTIORARI

George Washington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 17, 1997, in order to resolve the conflict between that ruling and rulings of other Circuit Courts of Appeals and to settle important questions concerning the interpretation of *Heck v. Humphrey*, 512 U.S. 477 (1994), as to when causes of action alleging violations of the Fourth Amendment arise if the cause of action is inconsistent with the plaintiff's conviction in a criminal case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in this matter is reported at 127 F.3d 552 (CA7 1997). The decision of the District Court for the Northern District of Illinois is reported at 1996 U.S. Dist. LEXIS 4357.

JURISDICTION

On April 4, 1996, The United States District Court for the Northern District of Illinois entered judgment in favor of all respondents on petitioner's claims that the respondents violated his Fourth Amendment rights by arresting, beating, imprisoning and prosecuting him. Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the district court's decision in an opinion entered on September 17, 1997. A Petition for Rehearing was denied on November 13, 1997.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a) The Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

b) 42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner's complaint alleged that on March 9, 1991, he was arrested without probable cause by respondent Chicago police officer Summerville. App. 39. Petitioner was then taken to a police station where respondent Summerville repeatedly beat and kicked him in order to extract an inculpatory statement, and other respondent officers failed to intervene to prevent the abuse. App. 39-40. After this abuse had continued for an extended period, and to avoid further abuse, petitioner agreed to make a false inculpatory statement. App. 40. On the basis of this statement, and the false and unlawfully obtained evidence generated by respondents, petitioner was charged with murder and imprisoned pending trial. App. 40. In the criminal case petitioner brought a motion to suppress his statement on grounds of brutality. The motion was initially denied but was later granted after Summerville, who had been charged with various felonies, refused to testify about his reported drug use. App. 40; Plaintiff's Response to Respondents' Motion to Dismiss, Attachments 8-11. After the statement was suppressed, all charges against the plaintiff were dropped and he was released from custody on May 23, 1994. App. 41.

On March 8, 1995, plaintiff filed suit under 42 U.S.C. § 1983 alleging, *inter alia*, false arrest, excessive force and failure to prevent excessive force, wrongful confinement and wrongful prosecution. The excessive force claim included an allegation that the force caused plaintiff to make a false inculpatory statement which proximately caused his imprisonment and prosecution. App. 40, 41.

The district court dismissed all counts of plaintiff's complaint, rejecting plaintiff's argument that *Heck v. Humphrey*, 512 U.S. 477 (1994), delayed the accrual of the false arrest and excessive force claims, and holding that the claims were filed outside the two year limitations periods. The court also ruled that plaintiff's state and federal malicious prosecution claims were time-barred and failed

to state valid claims for relief.

The Seventh Circuit affirmed, holding that *Heck* did not delay accrual of false arrest and excessive force claims since such claims do not always inevitably undermine a conviction. The court rejected Washington's argument that an individualized inquiry must be made under *Heck* to determine whether, in the factual circumstance of his particular case, his civil rights claims were inconsistent with his potential conviction. A majority of the panel also upheld summary judgment against Washington on his wrongful prosecution claim on grounds not relevant to this Petition.

REASONS FOR GRANTING THE WRIT

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court attempted to reconcile 42 U.S.C. § 1983 and 28 U.S.C. § 2254 by holding that a civil cause of action which called into question the lawfulness of conviction or confinement is not cognizable until the conviction has been overturned. The Seventh Circuit Court of Appeals, in this and other cases, has restricted the scope of *Heck*, holding that it does not defer accrual of causes of action based upon the Fourth Amendment. The Seventh Circuit has reasoned that because there could potentially be a valid criminal conviction, notwithstanding the alleged Fourth Amendment violation, *Heck* does not apply and does not defer accrual of the civil action. The court has rejected a case by case examination of the facts to determine whether, in that particular case, the § 1983 claim and the criminal conviction are inconsistent.

The Seventh Circuit's holdings contradict the express holding of *Heck*, are inconsistent with the reasoning underlying this Court's decision in *Heck* and their reasoning has been rejected by several other Circuit Courts of Appeals. The holding of the Seventh Circuit allows for contemporaneous civil litigation of issues critical to a live criminal prosecution, presents the possibility of collateral

attack on a criminal prosecution through the means of a civil suit and promotes uncertainty about when a cause of action for violation of Fourth Amendment rights arises. Moreover, the holding bars meritorious civil litigants from relief where their unjust prosecution or confinement has extended beyond the applicable limitations period, since it is highly unlikely that a criminal defendant falsely charged with a serious offense will be able to litigate his civil cause of action while his criminal conviction, or the criminal proceeding, are extant. While *Heck* has effectively limited the number of unmeritorious § 1983 suits which survive a motion to dismiss, it should be applied consistently so as to preserve meritorious suits by persons who were subjected to Fourth Amendment violations which were integrally connected to their prosecution, where proof of the violation would be inconsistent with the plaintiff's criminal conviction.

1. *Heck v. Humphrey* Delays Accrual of Fourth Amendment Claims Where Success on Those Claims Would Be Inconsistent in Fact with Petitioner's Potential Conviction.

The Seventh Circuit, relying on its prior holding in *Booker v. Ward,* 94 F.3d 1052 (CA7 1996), held that the factual conflict between plaintiff's potential criminal conviction and his § 1983 claims did not prevent the accrual of those claims while the criminal prosecution was pending. The court held that because it is abstractly possible for a plaintiff to prevail on a Fourth Amendment claim and still have a perfectly valid conviction, accrual of such claims is never deferred by *Heck*. The court rejected plaintiff's argument that *Heck* calls for an individualized inquiry focusing on the facts of the particular case, and that if the conviction would in fact be inconsistent with the excessive force and false arrest claims, as it is in this case, accrual is deferred. The Seventh Circuit's holding is inconsistent with the holding of *Heck* and the policy determinations underlying that decision.

Heck held that claims that officers had engaged in an "unlawful, unreasonable and arbitrary investigation" leading to plaintiff's arrest, had performed an "illegal and unlawful voice identification procedure" which they then used at plaintiff's criminal trial, and plaintiff's claims that the defendants had "knowingly destroyed" exculpatory evidence, in effect challenged the legality of Heck's conviction for manslaughter and did not accrue until he had succeeded in obtaining reversal of his conviction. The opinion cited the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."

Heck did not hold that deferral did not occur when the civil rights claims were based upon the Fourth Amendment. On the contrary, some of the claims that Heck presented were themselves based upon the Fourth Amendment. Moreover, in footnote 7 of the *Heck* opinion the Court specifically held that if a claimed Fourth Amendment violation resulted in imprisonment there could be recovery for the damages caused by that imprisonment only after the conviction was overturned. In the same footnote this Court noted that a suit based upon the Fourth Amendment might have no effect on a criminal prosecution - because doctrines such as independent source, inevitable discovery and harmless error might mean that the § 1983 action would not "necessarily imply" that the plaintiff's conviction was unlawful - but it did not hold that accrual of a Fourth Amendment suit was never deferred by a prosecution or conviction.

Heck mandates that there must be an individualized inquiry in each case to determine whether a holding in favor of the plaintiff in the civil case would be necessarily inconsistent with the plaintiff's conviction. Portions of Heck's claims, especially those relating to the investigation, were not, in every circumstance, inconsistent with his criminal conviction. Obviously a person can be validly convicted even if he has been the victim of an unfair investigation, an unlawful voice identification procedure and even if the defendants knowingly destroyed exculpatory evidence. This Court was clear, however, that

all of Heck's claims must be dismissed, finding that in the context of the particular case, Heck's claims were inconsistent with, and effectively challenged the legality of, his conviction.

Despite the clear mandate of *Heck,* the Seventh Circuit has rejected any individualized inquiry into the inconsistency between a Fourth Amendment civil claim and a criminal conviction, and has held that no Fourth Amendment claim is deferred by the pendency of a criminal prosecution or conviction. *Washington v. Summerville*, 127 F.3d 552, 555-57 (CA7 1997); *Gonzalez v. Entress*, 1998 U.S. App. LEXIS 368 (CA7); *Booker v. Ward*, 94 F.3d 1052 (CA7 1996). The court has reasoned that a Fourth Amendment violation may, abstractly, be followed by a valid conviction, and the fact that the criminal conviction and the § 1983 claim are in fact inconsistent is irrelevant. This reasoning is inconsistent with the express holding of *Heck* and with the policy considerations underlying that decision.

This Court stressed that its decision in *Heck* was based upon the "strong judicial policy" against the creation of two conflicting resolutions based upon the same set of facts. Yet the panel opinions in *Washington, Booker* and *Gonzalez* would allow such a conflict. Plaintiff could lose his motion to suppress in criminal court, be convicted based upon the contested statement, yet still be able to bring, and win, a § 1983 suit based upon the same issues he raised in criminal court, providing he could avoid the preclusive effect of the state court ruling. He could obtain damages for the damages caused by the beating and statement, including damages for wrongful confinement, even though his conviction was still extant, precisely the result that this Court in *Heck* said must be avoided. In addition, *Heck* evidenced a strong preference for allowing criminal cases to run their course before allowing civil cases based on the same facts. In this way the courts can avoid huge numbers of cases being filed that have no realistic chance of success. *Washington, Booker* and *Gonzalez* militate against this and encourage anyone who has a potential civil rights claim to file it prematurely, while the criminal

proceedings are ongoing.

The Seventh Circuit's exclusion of Fourth Amendment claims from the reach of *Heck* is contrary to the holdings of several other circuits. *See, e.g., Newman v. Jensen,* 1997 U.S. App. LEXIS 30023 (CA9 1997) (false arrest claim barred by *Heck* where the plaintiff's conviction had not been reversed); *Helmet Law Defense League v. California Highway* Patrol, 1997 U.S. App. LEXIS 23675 (CA9 1997) (id.); *Hudson v. Hughes*, 98 F.3d 868 (CA5 1996) (accrual of Fourth Amendment claim for arrest without probable cause was deferred by the plaintiff's criminal conviction where items found on the plaintiff and necessary for the criminal conviction would be suppressed if the arrest were unlawful); *Humberto Alvarez-Machain v. United States*, 96 F.3d 1246 (CA9 1996) (FTCA false arrest and imprisonment claims did not arise until after the plaintiff had successfully challenged the criminal case against him); *Whiting v. Traylor*, 85 F.3d 581 (CA11 1996) (where an arrest is pursuant to a warrant issued after a criminal information has been filed, the statute of limitations for a false arrest claim does not begin to run until the case upon which the warrant was based has been determined in the plaintiff's favor); *Smithart v. Towery*, 79 F.3d 951 (CA9 1996) (false arrest claim dismissed pursuant to *Heck* where there was an extant criminal conviction); *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1 (CA1 1995) (claim of false arrest pursuant to a warrant dismissed where the plaintiff's conviction had not been overturned); *Schilling v. Massie*, 58 F.3d 1081 (CA6 1995) (false arrest claim did not accrue until the criminal case had resolved in plaintiff's favor); *Woods v. Candela*, 47 F.3d 546 (CA2 1995), cert. denied, 116 S. Ct. 54 (1995) (false arrest claim did not arise until after the criminal conviction had been reversed because the evidence used to convict the plaintiff was obtained pursuant to a wrongful arrest and should have been suppressed); *Mackey v. Dickson*, 47 F.3d 744 (CA5 1995) (false arrest claim did not arise until conviction had been reversed where the conviction was based

upon evidence obtained as a result of the arrest); *Jackson v. Vannoy*, 49 F.3d 175 (CA10 1995) (accrual of false arrest claim was deferred where a judgment in favor of the plaintiff on his illegal seizure claim would necessarily imply the invalidity of the revocation of his probation and parole, where the revocation was based upon evidence obtained as a result of the arrest).

The conflict between the Seventh Circuit and these other circuits should be resolved by this Court granting certiorari in this case. By excluding Fourth Amendment cases from the reach of *Heck* the Seventh Circuit is limiting the effect of *Heck* in weeding out unmeritorious cases, while imposing upon unjustly detained persons an unrealistic burden to litigate issues in a civil forum while their life is at stake in a criminal case. The effect of the Seventh Circuit's position will be an increase in the number of unwinnable § 1983 cases which are filed, while arbitrarily denying relief to unjustly detained prisoners whose false imprisonment extends beyond the limitations period in their jurisdiction. This result is inconsistent with judicial economy and the ideals of justice, and is contrary to a fair reading of *Heck*.

CONCLUSION

This court should grant certiorari in this case and hold that *Heck v. Humphrey* delays the accrual of Fourth Amendment civil claims which are inconsistent with the petitioner's civil conviction.

Respectfully Submitted,

Dated: February 13, 1998

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2084

GEORGE WASHINGTON,

Plaintiff-Appellant,

v.

JOHN SUMMERVILLE, P. FOLEY,
J. CAPESIUS, and the CITY OF CHICAGO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 203 - **George M. Marovich**, *Judge*.

February 27, 1997, Argued
September 17, 1997, Decided

Before BAUER, HARLINGTON WOOD, JR., and ROVNER, *Circuit Judges*. ROVNER, *Circuit Judge*, concurring in

part, and dissenting in part.

BAUER, *Circuit Judge.* Plaintiff George Washington filed an action under 42 U.S.C. § 1983 against three detectives in their individual capacities and against the City of Chicago under the doctrine of respondeat superior. Among the eight counts in the complaint were allegations of unlawful arrest, excessive force, and federal and state claims for malicious prosecution. The detectives and the City moved to vacate or dismiss Washington's complaint for failure to state timely and/or cognizable claims under § 1983. The district court denied Defendants' motion to vacate, dismissed six of the counts, and granted summary judgment for Defendants on the remaining two counts. Washington appealed. On appeal, Washington maintains that his claims of unlawful arrest and excessive force were timely filed and that his malicious prosecution claims should be recognized.

Background

The district court accepted Washington's factual allegations as true for purposes of the detectives' motion to dismiss, and we do the same on appeal. Apostol v. Landau, 957 F.2d 339, 343 (7th Cir. 1992) (citations omitted). On March 9, 1991, Detective John Summerville and another detective stopped an automobile at the intersection of Cermak Road and Fairfield Street in Chicago. Without a warrant, the detectives arrested George Washington, a passenger in the car. Summerville shoved Washington's head against the trunk of the car. After transporting Washington to Area IV Headquarters, the detectives took him to an interrogation room, where they pushed Washington's head against a wall, knocking him unconscious. The detectives then handcuffed Washington to the wall of the interrogation room. Summerville struck Washington in the throat and demanded that Washington make an inculpatory statement. He then left the room.

According to Washington's complaint, Detective Patrick Foley told Washington that his treatment would grow steadily worse if he refused to cooperate. When Washington replied that he did not understand what Foley was talking about, Foley struck Washington across his face. Summerville then returned to the interrogation room and strongly suggested that Washington should tell an Assistant State's Attorney about his involvement in a murder. When Washington again stated that he did not know what the detective was talking about, Summerville kicked Washington in the groin. Washington's complaint also accused Detective James Capesius of making similar threats if Washington failed to cooperate. After Summerville repeatedly struck him in the ribs with a flashlight, Washington made some inculpatory statements concerning the murder. Washington then repeated his statements to Assistant State's Attorney ("ASA") Michael Cawley.

On April 5, 1991, Washington was indicted for first degree murder in Illinois state court. On November 8, 1991, Washington filed a motion to suppress his statements on the ground that they were coerced by the detectives' excessive force. The court denied the motion. Washington filed two subsequent motions for reconsideration and/or rehearing on the motion to suppress, both of which the trial court denied.

On October 6, 1993, Washington filed a third motion for reconsideration and/or rehearing. After reading newspaper stories about Summerville's alleged drug use and other criminal activity, the court decided to reopen and hold a hearing on Washington's motion. The court was informed that Summerville would invoke his Fifth Amendment privilege against self-incrimination in response to any inquiries about his reported drug use. The court concluded that Washington was entitled to cross examine Summerville on his drug use and that it had no other choice but to grant Washington's motion and suppress his statements. Washington was released from custody on May 23, 1994 after the court granted the State's Attorney's nolle

prosequi motion.

On January 12, 1994, Washington filed a pro se complaint and a motion for leave to proceed in forma pauperis in the Northern District of Illinois, Eastern Division. In his complaint, Washington alleged various claims of excessive force and failure to protect under 42 U.S.C. § 1983. He named Cook County State's Attorney Jack O'Malley, ASA Cawley, Det. Summerville, Det. Foley, Det. Capesius, the Chicago Police Department, and the Cook County State's Attorney's Office as defendants. Summerville, Foley, and Capesius were never served with the complaint.

On April 29, 1994, Judge Ann Claire Williams gave Washington until May 10, 1994 to show cause why his complaint should not be dismissed because it was filed after the statute of limitations had run. On June 9, 1994, upon receiving no response from Washington, Judge Williams denied Washington's motion for leave to proceed in forma pauperis and dismissed his complaint as untimely.

On February 27, 1995, Washington filed a motion to vacate the June 9, 1994 order. Judge Williams granted Washington's motion and allowed him to file an amended complaint. Washington filed an eight-count amended complaint on March 9, 1995, naming Detectives Summerville, Foley, and Capesius in their individual capacities and the City of Chicago under respondeat superior. The detectives and the City moved to vacate or dismiss Washington's first amended complaint. The district court (Judge George M. Marovich)[1] denied Defendants' motion to vacate, dismissed Counts I, II, IV, V, VII and VIII of Washington's first amended complaint, and granted

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[1] On February 23, 1996, Judge Williams entered an order reassigning this case to Judge Marovich.

summary judgment in favor of Defendants on Counts III and VI.[2] Washington filed a notice of appeal on May 1, 1996.

On appeal, Washington contends that his allegations of unlawful arrest and unreasonable force were timely filed. Washington also argues that he pleaded cognizable state and federal claims for malicious prosecution.

Analysis

A. The Heck v. Humphrey Hubbub

We review de novo a district court's 12(b)(6) dismissal. Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir. 1996). We accept as true all facts alleged in the complaint and draw all reasonable inferences from them in the plaintiff's favor. Apostol v. Landau, 957 F.2d 339, 343 (7th Cir. 1992) (citations omitted). We will affirm the dismissal of a complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)).

Washington argues that the district court should not have dismissed his § 1983 claims of unlawful arrest and excessive force as untimely. He believes that, under Heck v. Humphrey, 512 U.S. 477, 129 L. Ed.

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[2] The district court converted Defendants' motion to dismiss into a motion for summary judgment as to Counts III and Count VI (Washington's federal and state malicious prosecution claims, respectively) because documents outside the pleadings, including hearing transcripts, were discussed by both parties in their various briefs and were required for the district court's consideration of Defendants' motion with respect to Counts III and VI.

2d 383, 114 S. Ct. 2364 (1994), his cause of action did not arise, and hence the statute of limitations on these claims did not begin to run, until the criminal proceedings against him had terminated because success on either of his claims would have undermined the validity of Washington's possible conviction.

There is a two-year statute of limitations for § 1983 claims arising in Illinois. Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996) (citation omitted). To determine when Washington's § 1983 claim accrued, we look to Heck v. Humphrey, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), and our own subsequent case of Booker v. Ward. In Heck, the Court held that a plaintiff seeking damages for an allegedly unconstitutional conviction or imprisonment, or for other harms caused by unlawful actions that would render a conviction or sentence invalid, has no § 1983 cause of action until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. Heck, 512 U.S. at 486-88. That is, if a judgment for the plaintiff "would necessarily imply the invalidity of his conviction or sentence," the plaintiff's § 1983 cause of action does not arise, and the statute of limitations on the action does not begin to run, until or unless the plaintiff's conviction or sentence has been held invalid. Id. at 487. Conversely, if "the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," his § 1983 cause of action arises, and the statute of limitations on the action begins to run, when the plaintiff knows or should have known that his constitutional rights have been violated. Id.

In Heck, the Court did not explicitly address claims, which, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal charge. However, in Smith v. Holtz, 87 F.3d 108, 112-13 (3d Cir.), cert. denied, 117 S. Ct. 611 (1996), the Third Circuit discussed this issue, which Washington posits before us. In Smith, Smith alleged that the defendants

suppressed exculpatory evidence and contrived inculpatory evidence, and he sought damages from his unlawful conviction and confinement. Id. at 112. As a preliminary matter, the Third Circuit found that if Smith had brought his allegations before September 18, 1992, when the Pennsylvania Supreme Court ordered that the charges against him be dismissed, success on these claims would have necessarily implied the invalidity of any future conviction on the still pending criminal charges. Id.

The Third Circuit went on to note that many of the concerns noted in Heck apply equally to claims that, if successful, would necessarily imply the invalidity of a future conviction on a pending charge. Id. at 113. Specifically, it found that if such a claim could proceed while criminal proceedings are ongoing, there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit. In terms of the conflicts which Heck sought to avoid, there is no difference between a conviction which is outstanding at the time the civil rights action is instituted and a potential conviction on a pending charge that may be entered at some point thereafter.

Because of these concerns, we hold that a claim that, if successful, would necessarily imply the invalidity of a conviction on a pending criminal charge is not cognizable under § 1983. It necessarily follows that so long as success on such a claim would necessarily imply the invalidity of a conviction in the pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist. This did not occur in Smith's case until the Pennsylvania Supreme Court ordered the charges dismissed on September 18, 1992. Smith's claims thus did not accrue before that date and, since he filed those claims within two years thereafter, they are not time barred. Id. (internal citation omitted).

Smith instructs that we must ask initially whether Washington's unlawful arrest and excessive force claims, if successful, would necessarily imply the invalidity of a potential conviction on the murder charge against him. If success on these claims would have necessarily implied the invalidity of a potential conviction on the murder charge, then Washington's claims did not accrue until the day on which the murder charge was dismissed; in which case, his claims were timely filed within the two-year statute of limitations period. If success on these claims would not have necessarily implied the invalidity of a potential conviction on the murder charge, then Washington's claims accrued on the day of his arrest, and his claims are therefore time-barred.

Booker v. Ward, 94 F.3d 1052 (7th Cir. 1996), tells us that Washington's claims, even if successful, will not undermine the validity of a potential conviction for murder. Like Washington argues here concerning his potential conviction, Booker contended that success on his unlawful arrest claim would have implied the invalidity of his conviction, and that, therefore, under Heck, he could not have brought his claim until the trial court vacated his conviction. Id. at 1056. We disagreed and concluded that a wrongful arrest claim, like many Fourth Amendment claims, does not inevitably undermine a conviction because a plaintiff can wage a successful wrongful arrest claim and still have a perfectly valid conviction. Id. (citations omitted).

Washington's additional claim of excessive force does little to distinguish his case from Booker's, because excessive force claims are likewise analyzed under the rubric of the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) ("Where, as here, the excessive force claim arises in the context of an arrest or an investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures.'"); see also

Lanigan v. Village of East Hazelcrest, Ill., 110 F.3d 467, 474 (7th Cir. 1997).

Washington's success on either his unlawful arrest or excessive force claim would not have necessarily implied the invalidity of a potential conviction on the murder charge against him. Accordingly, the statute of limitations on Washington's claims began to run when he knew or should have known that his constitutional rights had been violated--the date of his arrest, March 9, 1991. See Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995); Wilson v. Giesen, 956 F.2d 738, 740 (7th Cir. 1992); see also Heck, 512 U.S. at 487 n.7. Washington initially brought his claims on January 12, 1994. Washington's claims are therefore time-barred, as he did not bring them within Illinois' two-year statutory period for § 1983 actions.

B. The Viability of Washington's Malicious Prosecution Claims

Because the district court converted the detectives' motion to dismiss into a motion for summary judgment as to both of Washington's malicious prosecution claims, we use its standard of review. We review the district court's grant of summary judgment de novo. McGinn v. Burlington N.R.R. Co., 102 F.3d 295, 299 (7th Cir. 1996) (citation omitted). In deciding whether any genuine issues of material fact exist, we view the record and extract all reasonable inferences from it in the light most favorable to the nonmoving party. Id. (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). The applicable substantive law will dictate which facts are material. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). Only disputes that could affect the outcome of the suit under governing law will preclude an entry of judgment. Id.

1. Washington's Claim of Malicious Prosecution Under Illinois Law.

Washington contends that the district court erred when it determined that he had not presented sufficient evidence of malicious prosecution under Illinois law to survive summary judgment. To state a claim for malicious prosecution under Illinois law, the plaintiff must allege that: (1) the defendant commenced or continued an original criminal or civil proceeding; (2) the proceeding terminated in the plaintiff's favor; (3) the defendant instituted the proceeding without probable cause; (4) the defendant acted maliciously in initiating or continuing the proceeding; and (5) the plaintiff was injured. Curtis v. Bembenek, 48 F.3d 281, 286 (7th Cir. 1995) (citations omitted); Swick v. Liautaud, 169 Ill. 2d 504, 662 N.E.2d 1238, 1242, 215 Ill. Dec. 98 (Ill. 1996) (citations omitted). All of these elements must be present for the plaintiff to pursue a claim. Swick, 662 N.E.2d at 1242 (citations omitted). In order to fulfill the second element, a plaintiff cannot predicate his malicious prosecution action on underlying criminal proceedings which were terminated in a manner not indicative of the innocence of the accused. Id. (citations omitted).

The issue before us is whether the nolle prosequi of a criminal charge constitutes a favorable termination in a malicious prosecution action. A nolle prosequi is not a final disposition of a case but is a procedure which restores the matter to the same state which existed before the Government initiated the prosecution. Id. (citations omitted). In the civil malicious prosecution context, the majority rule is that a criminal proceeding has been terminated in favor of the defendant when a prosecutor formally abandons the proceedings via a nolle prosequi, unless he abandons the prosecution for reasons not indicative of the defendant's innocence. 662 N.E.2d at 1242-43 (citations omitted). The abandonment of the proceedings does not indicate the innocence of the accused when the nolle prosequi results from: an agreement or compromise with the accused; misconduct on the part of the accused in order to prevent trial; or the impossibility or impracticability of having the accused tried. 662 N.E.2d at 1243 (citing Restatement (Second) of Torts §§ 660, 661 (1970)) The

plaintiff has the burden of proving a favorable termination. Id. (citation omitted). The plaintiff meets his burden of proof only when he establishes that the nolle prosequi was entered for reasons consistent with his innocence. Id. The circumstances surrounding the cessation of the criminal proceedings must compel an inference that reasonable grounds to pursue the criminal prosecution were lacking. Id. (citation omitted). The Illinois Supreme Court has warned that "otherwise, every time criminal charges are nolprossed, a civil malicious prosecution action could result." Id.

In Swick, Swick alleged in his complaint that the nolle prosequi was entered because of a lack of evidence pointing to his guilt. The defendants answered with a denial of Swick's allegation. The nolle prosequi order did not reflect the reasons for its entry. It merely stated, "m/s nolle pros per Gary Johnson [presumably the ASA on the case] instruction recall warrants" and was signed by the trial judge. At trial, the police lieutenant who investigated the charges that the defendants brought against Swick testified about the nolle prosequi, but he did not state any reasons for its entry. Because of the lack of evidence at trial regarding the reasons for the nolle prosequi order, the court found that Swick had failed to meet his burden. Id. It concluded, "The bare use of the nolle prosequi order, which did not state its reasons for its entry, did not establish that the criminal proceedings were terminated in a manner consistent with Swick's innocence." Id.

Similarly, in this case, Washington alleged that "Summerville, Capesius, and Foley individually and/or jointly and in conspiracy, initiated and continued a malicious prosecution, without probable cause, against plaintiff. Said prosecution was ultimately determined in plaintiff's favor." In their motion to vacate or dismiss Washington's first amended complaint, the detectives responded that Washington could not "establish a termination of the state court proceedings in his favor indicative of innocence." Like Swick, we have an assertion by Washington that the dismissal of his case was

indicative of his innocence, and we have a denial by the detectives. We also have a case where the order itself does not elucidate the reasons for its entry. It merely states, "m/s Nolle Prosse DDT." Roughly translated, the order noted that the State made a nolle prosequi motion and that the defendant demanded trial.

We have the benefit of evidence other than the pleadings to which both parties refer in support of their positions. Unfortunately for Washington, the evidence from the state court transcripts flies in the face of his position. After finding Washington's testimony that his statements were coerced to be unbelievable, the trial court first denied Washington's motion to suppress on July 12, 1993. The trial judge denied Washington's two subsequent motions for reconsideration and/or rehearing. After Washington's third motion, the trial judge found that information in Summerville's medical records called for the reopening of Washington's motion to suppress and for a hearing on the issue of Summerville's credibility. When the court learned that Summerville would exercise his Fifth Amendment privilege if called to testify, it stated: Given the Court's findings that there is relevant inquiry that the Defendant in this case is entitled to inquire into and the fact that the witness refuses to testify pursuant to his own constitutional rights, the Court has no choice, therefore, but to grant the motion to suppress the statements. Washington failed to bring forth sufficient evidence to withstand summary judgment. A bare nolle prosse without more is not indicative of innocence. Lack of a recorded reason for the nolle prosequi offers no insight as to the validity or invalidity of Washington's position, and the trial transcript flat out disfavors his contention. Accordingly, we affirm the district court's decision to grant the detectives' motion for summary judgment.

2. The 42 U.S.C. § 1983 Claim

Title 42 U.S.C. § 1983 creates a federal cause of action for "the deprivation, under color of state law, of a citizen's rights, privileges,

or immunities secured by the Constitution and laws of the United States." Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997) (quoting Livadas v. Bradshaw, 512 U.S. 107, 132, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994)). In any § 1983 analysis, we first have to pinpoint the specific constitutional right that was allegedly violated. Id. (citing Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)). Albright v. Oliver instructs that the only constitutional amendment that is implicated by a malicious prosecution claim is the Fourth Amendment. Albright v. Oliver, 510 U.S. 266, 271, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994); Reed v. City of Chicago, 77 F.3d 1049, 1052 (7th Cir. 1996). To state a claim for malicious prosecution under § 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. Reed, 77 F.3d at 1051 (citing Smart v. Board of Trustees of University of Ill., 34 F.3d 432, 434 (7th Cir. 1994), cert. denied, 513 U.S. 1129, 130 L. Ed. 2d 885, 115 S. Ct. 941 (1995)).

Washington claims that he has a cognizable federal claim for malicious prosecution. He argues that under Reed, both his state and federal claims of malicious prosecution should have survived summary judgment because he provided sufficient evidence of malicious prosecution under Illinois law. We disagree.

We have already found that Washington has not satisfied the requirements of a state law cause of action for malicious prosecution. Washington's federal claim must fail as well, since he has not met the first element of a federal malicious prosecution claim. We also caution against Washington's reading of Reed. A state law cause of action for malicious prosecution is not interchangeable with a federal action, for underlying any § 1983 claim is a constitutional violation. A plaintiff bringing a federal malicious prosecution claim must first clear the preliminary hurdle of stating a cognizable constitutional violation before his § 1983 action can go forward. We recall that the

Supreme Court has stated that there is no remedy under § 1983 for an abuse of state power that does not in fact violate federal law. See Collins v. City of Harker Heights, 503 U.S. 115, 119, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992) (citations omitted).

In this case, even if Washington had met the specific requirements for a federal malicious prosecution claim, he has not alleged a cognizable violation of federal law. Washington's case is virtually identical to that which was dismissed in Reed v. City of Chicago. There we asked whether Reed should be allowed to shoehorn a wrongful arrest claim into a malicious prosecution claim in order to avoid a successful statute of limitations' defense. Reed, 77 F.3d at 1051. Reed alleged that the defendant detectives deprived him of his right to be free from unlawful arrest, unreasonable search and seizure, wrongful confinement and detention, and malicious prosecution as well as a pendent state law claim for malicious prosecution. 77 F.3d at 1050.

Washington's attempts to distinguish his case from Reed's are in vain. He argues that in Reed, we found it significant that Reed had alleged only that the defendant detectives "testified," not that they testified falsely. See Reed, 77 F.3d at 1053. Washington is correct that he alleged more than Reed. In Count IV of his first amended complaint, Washington alleged that the detectives and other unnamed detectives and police supervisory personnel conspired to fill out false and incomplete statements and reports and to use these illegally obtained statements to charge, imprison, and prosecute Washington. Washington further alleged that the detectives conspired to give false testimony at the grand jury and at his motion to suppress hearing and to conceal all of this misconduct.

However, these allegations go to the heart of Washington's illegal arrest and excessive force claims. Washington alleged that the defendant detectives did not note his illegal arrest and coerced confession in their reports and that these reports were used to bring

charges against Washington. Washington also accused the detectives of giving false testimony because they failed to mention Washington's unlawful arrest and his coerced confession. Moreover, these allegations are not part of Washington's unlawful arrest, excessive force and malicious prosecution claims. Rather, they are mentioned in a conspiracy count which the district court dismissed because the alleged conspiratorial acts were either time-barred or subject to the detectives' absolute immunity. Washington does not contest the dismissal of the conspiracy count on appeal.

Washington's reliance on a malicious prosecution claim against the detectives is misplaced. In her concurrence in Albright v. Oliver, Justice Ginsburg explained that a malicious prosecution claim against police officers is an anomaly. 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring). She reasoned that the principal player in carrying out a prosecution is not the police officer, but the prosecutor. Id. The detectives' role in this case was in effectuating and maintaining a seizure, not in initiating and pursuing a criminal prosecution.[3] In his amended complaint, Washington never named ASA Cawley, the person responsible for bringing charges against

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[3]Although Justice Ginsburg found malicious prosecution suits against police officers an anomaly, she went on to state that a malicious prosecution claim could be found under the Fourth Amendment in that a defendant remains seized for trial so long as he is obligated to appear in court and answer the State's charges. See Albright, 510 U.S. at 279. The concept of a "continuing seizure" would no doubt change when a cause of action would accrue. The limitations' period would not begin to run until the accused was released from custody. This Circuit, however, has rejected the concept of a continuing seizure. See, e.g., Reed, 77 F.3d at 1052 n.3; Wilkins v. May, 872 F.2d 190, 193 (7th Cir. 1989), cert. denied, 493 U.S. 1026 (1990).

him, as a defendant. Washington has only refashioned his false arrest and excessive force claims under the guise of a federal malicious prosecution claim. We have already held that those claims accrued at the time of Washington's arrest and that they are, therefore, untimely.

Conclusion

George Washington's claims are either time-barred or simply not viable. We therefore AFFIRM the judgment of the district court.

CONCURBY: ROVNER (In Part)

DISSENTBY: ROVNER (In Part)

DISSENT: ROVNER, Circuit Judge, concurring in part, and dissenting in part. I agree that Washington's unlawful arrest and excessive force claims are barred by Illinois' two-year statute of limitations, and I therefore concur in that portion of the court's opinion. I respectfully dissent, however, from the majority's decision to affirm the dismissal of Washington's malicious prosecution claims. In my view, the district court's judgment on those claims should be reversed and the claims remanded for trial.

The majority's conclusion about Washington's section 1983 malicious prosecution claim relies on what I believe to be a misguided interpretation of Justice Ginsburg's concurring opinion in Albright v. Oliver, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994). (See ante at 15-16.) Just as the court did in Reed v. City of Chicago, 77 F.3d 1049, 1053 (7th Cir. 1996), the majority today highlights a footnote to Justice Ginsburg's concurrence which indicates that a malicious prosecution claim against a police officer is "anomalous" because prosecutors and not police officers initiate criminal proceedings. See Albright, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). Yet my colleagues lose sight of the fact that despite

that footnote, Justice Ginsburg would recognize a malicious prosecution-type claim against a police officer when the plaintiff alleges, as Washington did here, that the officer perpetuated the initial Fourth Amendment "seizure" by providing false or misleading testimony in the proceedings against the defendant. 510 U.S. at 280-81 (Ginsburg, J., concurring); see also Murphy v. Lynn, 118 F.3d 938, No. 96-2392, 1997 WL 371091, at * 6-7 (2d Cir. July 8, 1997).

I must add a word as well about the majority's statement that Washington failed to satisfy his burden on summary judgment because he came forward with no evidence of the reason for the dismissal other than the bare nolle prosequi order itself. (Ante at 13.) What the majority ignores, however, is that defendants' motion did not put Washington to his proof on that issue. Initially, it is important to emphasize that defendants' motion was one to dismiss under Rule 12(b)(6), which the district court then converted to a summary judgment motion because the parties had relied on state court records that were outside the federal pleadings. Significantly, because they essentially were moving to dismiss, the defendants never argued that the nolle prosequi motion was filed by the prosecutor for any reason other than the lack of evidence on which to proceed once Washington's confession was suppressed. Instead, defendants made a legal argument that did not address the reason for the nolle prosequi motion at all; they argued that because the motion to suppress was granted on "technical" grounds, the subsequent dismissal was not indicative of Washington's innocence. (See R. 28, at 9-11; see also R. 27, at 10-13.) The district court accepted that legal argument (R. 32, at 12-15), but my colleagues quite rightly have not. Instead, they have found that Washington failed to satisfy a burden that he never had under the circumstances, based upon an argument that the defendants never made.

In that sense, despite the majority's contrary pronouncement, this case is easily distinguished from Reed. (Cf. ante at 14

("Washington's case is virtually identical to that which was dismissed in Reed.").) There, the panel emphasized that the allegations supporting Reed's malicious prosecution claim were not sufficiently distinct from the allegations in his time-barred unlawful arrest and detention claims because Reed did not allege that the defendant police officers had committed any further unlawful act. Reed did not allege, for example, that the officers had testified untruthfully at subsequent hearings; he merely alleged that the officers had "testified." 77 F.3d at 1053, 1054 ("There is no allegation that the detectives covered up exculpatory evidence or testified untruthfully."). Here, however, Washington met the very objection raised by the panel in Reed--he alleged that even after his unlawful arrest, the defendant officers coerced a false inculpatory statement from him through their use of excessive force, fabricated evidence against him, prepared false reports, and then attempted to cover up their misdeeds by testifying falsely in subsequent hearings, including the hearing on Washington's motion to suppress his allegedly coerced confession. It is therefore simply not correct to say that the allegations here are "virtually identical" to those in Reed. (Cf. ante at 14.) Rather, it is clear that Washington alleged "knowing misstatements made by the officers to the prosecutor," as the panel required in Reed. See 77 F.3d at 1053; see also Curtis v. Bembenek, 48 F.3d 281, 286 (7th Cir. 1995) (implying that similar allegations would be sufficient to state a claim for malicious prosecution against a police officer under section 1983).

Once the underbrush is cleared away, it appears that the majority's rejection of Washington's malicious prosecution claim results principally from the fact that certain of the allegations supporting that claim were first made in Washington's time-barred unlawful arrest and excessive force claims. (See ante at 16 ("Washington has only refashioned his false arrest and excessive force claims under the guise of a federal malicious prosecution claim.").) But as I have just demonstrated, Washington's allegations in the current claim go much further than the allegations in those time-barred claims, and indeed,

they meet the objections that Judge Bauer himself raised to a similar claim in Reed. Those allegations also are plainly sufficient to state a claim under Justice Ginsburg's concurrence in Albright. See 510 U.S. at 280-81 (Ginsburg, J., concurring). At bottom, then, it seems to me that the majority must be saying that a malicious prosecution claim may never lie against a police officer when that claim is based in part on allegations common to a false arrest or excessive force claim. I find that to be a rather astonishing rule of law, and one that directly contradicts the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8(a) ("Relief in the alternative or of several different types may be demanded."). The simple fact that Washington's unlawful arrest and excessive force claims are time-barred does not prevent him from going forward with the malicious prosecution claim alleged here under section 1983. In addition to the constitutional problem, the majority also believes that Washington failed to satisfy the state-law requirement that the earlier criminal proceeding be terminated in his favor. See Swick v. Liautaud, 169 Ill. 2d 504, 662 N.E.2d 1238, 1242, 215 Ill. Dec. 98 (Ill. 1996) (setting out elements of a malicious prosecution claim under Illinois law). Again, I am unable to agree. In Swick, the Illinois Supreme Court followed the majority rule that the abandonment of a criminal proceeding via a nolle prosequi motion generally will be considered a termination in favor of the accused "unless the abandonment is for reasons not indicative of the innocence of the accused." 662 N.E.2d at 1242-43. That court then provided the following examples of when such an abandonment is not indicative of the accused's innocence: "when the nolle prosequi is the result of an agreement or compromise with the accused, misconduct on the part of the accused for the purpose of preventing trial, mercy requested or accepted by the accused, the institution of new criminal proceedings, or the impossibility or impracticability of bringing the accused to trial." 662 N.E.2d at 1243. The present case falls into none of these categories. Instead, I think it safe to assume that once the state trial judge suppressed Washington's allegedly coerced confession, the prosecutor filed a nolle prosequi motion because at that point, he lacked sufficient

evidence to pursue the murder charge. Indeed, the defendants have come forward with no other reason for the motion, nor have they suggested that the prosecutor had any evidence implicating Washington in the murder other than the allegedly coerced confession. In this case, then, I have no doubt that the circumstances surrounding the nolle prosequi motion "compel an inference that there existed a lack of reasonable grounds to pursue the criminal prosecution." Swick, 662 N.E.2d at 1243. There simply is no other viable explanation for the motion here.

My colleagues nonetheless are of the view that the circumstances leading up to the grant of the suppression motion suggest Washington's guilt rather than his innocence, as they assert that "the evidence from the state court transcripts flies in the face of [Washington's] position." (Ante at 12.) To support that assertion, the majority points out that after the original suppression hearing, the state trial judge chose to credit the police officers' testimony while finding Washington's story incredible. My colleagues emphasize, moreover, that it was only after Officer Summerville chose to exercise his Fifth Amendment privilege that the motion to suppress was granted. (Id.) I take it from this discussion that the majority must believe that Summerville's invocation of his Fifth Amendment privilege had no impact on the state trial judge's earlier credibility determinations, which my colleagues find indicative of Washington's guilt. But the state trial court obviously thought otherwise because it granted the motion to suppress once Summerville notified the court that he would refuse to answer questions the court found critical to his credibility, questions specifically relating to a twenty-two count indictment returned against Summerville, which included charges of official misconduct and sexual assault, and to reports that Summerville had been receiving treatment for substance abuse. To illustrate the nature of the trial court's concern, I excerpt below a portion of the court's ruling upon reopening the suppression issue: THE COURT: Just so I am clear and my recollection is refreshed, the statement in this case that is subject to litigation [i.e.,

Washington's confession] was taken by the detective [Summerville], is that correct, originally? [PROSECUTOR]: Originally, yes. THE COURT: There were no other officers present at the time of the statement, is that correct? [PROSECUTOR]: Yes. * * * THE COURT: So the Court spent time late yesterday afternoon reviewing [Summerville's medical] records. And it is the Court's determination that with all the competing interests involved here that the records will not be tendered. But I will inform the defense that they do provide information sufficient to warrant cross-examination of the witness in the areas that had previously been indicated, which puts us in a situation wherein the motion to reopen the motion to suppress, therefore, is granted. . . . Given the Court's findings that there is relevant inquiry that the defendant in this case is entitled to inquire into and the fact that the witness refuses to testify pursuant to his own constitutional rights, the Court has no choice, therefore, but to grant the motion to suppress the statements. So that will be granted. (R. 29, Ex. 11, at 4-7.)

It is apparent from this excerpt that the court's earlier credibility determinations, made without the benefit of cross-examination on these highly pertinent matters, do not withstand the later decision to suppress Washington's confession. And on the heels of that suppression order came the prosecutor's decision to dismiss the case via his nolle prosequi motion. The obvious inference to be drawn from these circumstances is that without the confession, the prosecutor had no reasonable grounds to pursue the charge against Washington. On defendants' motion for summary judgment, where the evidence must be viewed in a light most favorable to Washington (not to the defendants), that is the only permissible inference. The dismissal in these circumstances thus was clearly consistent with Washington's innocence.

For these reasons, I would reverse the dismissal of Washington's malicious prosecution claims and remand those claims to the district court for trial. From the majority's refusal to do so, I respectfully dissent.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

GEORGE WASHINGTON,	)
	) 94 C 203
Plaintiff,	)
	) Judge George M.
v.	) Marovich
	)
JOHN SUMMERVILLE,	)
PATRICK FOLEY, JAMES	)
CAPESIUS, and the	)
CITY OF CHICAGO,	)
	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Plaintiff George Washington ("Washington") filed this action pursuant to 42 U.S.C. § 1983 ("Section 1983") and Illinois law against Detective John Summerville ("Summerville"), Detective Patrick Foley ("Foley"), Detective James Capesius ("Capesius"), and the City of Chicago (the "City") (collectively "Defendants") alleging that the detectives violated various of Washington's constitutional rights by arresting him without probable [*2] cause, subjecting him to excessive force, unlawfully confining him, and subjecting him to malicious prosecution. Now before the Court is Defendants' motion to dismiss Washington's Complaint. For the reasons set forth below, this Court grants Defendants' motion.

FACTUAL BACKGROUND

The following factual allegations are accepted as true for purposes

of Defendants' motion to dismiss. Bowman v. Franklin, 980 F.2d 1104, 1107 (7th Cir. 1992). On March 9, 1991, Washington was arrested by Summerville and another detective without a warrant. During the course of his arrest, Summerville allegedly slammed Washington's head against the trunk of a car and, after taking Washington to Area IV headquarters, pushed Washington's head against a wall, knocking him unconscious. Further, Summerville purportedly struck Washington in the throat, demanded that Washington make an inculpatory statement, and kicked Washington in the groin several times.

While at Area IV, Foley apparently informed Washington that his treatment would get worse if Washington refused to cooperate; when Washington stated that he did not understand what Foley was talking about, Foley allegedly struck Washington across [*3] the face. Capesius similarly told Washington that he would receive worse treatment if he failed to cooperate with the detectives.

After purportedly being struck in the ribs with a flashlight numerous times by Summerville, Washington acceded to the detectives' requests for cooperation, made inculpatory statements, and repeated those statements to Assistant State's Attorney Michael Cawley ("Cawley").

On April 5, 1991, Washington was indicted for first degree murder. On November 8, 1991, Washington filed a motion seeking to suppress his inculpatory statements on the grounds that those statements were coerced by the police through the use of unlawful and excessive force. That motion was denied. Washington subsequently filed two Motions for Reconsideration and/or Rehearing of the Motion to Suppress, both of which were denied by the trial court.

On October 6, 1993, Washington filed a third Motion for Reconsideration and/or Rehearing of the Motion to Suppress. This

motion was prompted by reports of Summerville's alleged substance abuse and other criminal activities. Because Summerville refused to answer, on Fifth Amendment grounds, any questions concerning his substance abuse problems, [*4] the trial judge granted Washington's motion and suppressed Washington's inculpatory statements. Criminal charges against Washington subsequently were dismissed on May 23, 1994, and Washington was released from custody.

PROCEDURAL BACKGROUND

Washington filed a pro se Complaint and a Motion for Leave to Proceed In Forma Pauperis on January 12, 1994. In his Complaint, Washington alleged various Section 1983 claims for excessive force and failure to protect against State's Attorney Jack O'Malley, Cawley, Summerville, Foley, Capesius, the Chicago Police Department and the Cook County State's Attorney's Office. Summerville, Foley and Capesius were never served with this Complaint.

On April 29, 1994, Judge Williams, to whom this matter was originally assigned, granted Washington until May 10, 1994 to show cause why his Complaint should not be dismissed as untimely. On June 9, 1994, having received no response from Washington, Judge Williams denied Washington's Motion for Leave to Proceed In Forma Pauperis and dismissed Washington's Complaint as untimely.

On February 17, 1995, Washington filed a motion to vacate the June 9, 1994 Order pursuant to Fed. R. Civ. P. 60, asserting [*5] that there had been a change in controlling law. On March 8, 1995, Judge Williams, without a response from Defendants who had not been served, granted Washington's motion and permitted Washington to file a First Amended Complaint.

Washington's First Amended Complaint, filed on March 9, 1995,

includes the excessive force and failure to protect claims contained in Washington's original Complaint as well as additional claims not previously asserted. Count I is a Section 1983 claim against Summerville alleging arrest without probable cause. Count II is a Section 1983 claim against Summerville, Foley and Capesius alleging excessive force at the time of, and shortly after, Washington's arrest. Count III is a Section 1983 claim against Summerville, Foley and Capesius alleging wrongful confinement and prosecution. Count IV alleges a conspiracy between Summerville, Foley and Capesius with respect to the acts set forth in Counts II and III. Count V seeks recovery against Summerville, Foley and Capesius for the intentional infliction of emotional distress. Count VI is state law claim against Summerville, Foley and Capesius alleging malicious prosecution. Count VII seeks recovery from the City [*6] for the unlawful and/or improper acts of the detectives under the theory of respondeat superior; and Count VIII seeks recovery from the City pursuant to 745 ILCS 10/9-102.[4]

Defendants now seek dismissal of Washington's Complaint on the following grounds: Count I is time-barred and alleges no personal involvement by Foley and Capesius; Count II is time-barred; Count III and Count VI are untimely and/or fail to state claims of malicious prosecution under the Fourth Amendment or Illinois law because Washington's criminal prosecution did not terminate in a manner indicative of Washington's innocence; Count IV fails to state a claim of conspiracy because the overt acts alleged to have been committed in furtherance of the conspiracy are either time-barred or subject to Defendants' immunity; Count V is time-barred; and Counts VII and VIII fail to state [*7] claims against the City because the claims against the detectives upon which the City's liability allegedly is

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[4] Summerville, Foley and Capesius were served with Washington's First Amended Complaint on March 31, 1995; March 10, 1995; and March 13, 1995, respectively.

premised are either time-barred or legally insufficient.[5]

DISCUSSION

When considering a motion to dismiss, the court tests the sufficiency of the complaint, not the merits of the suit. Triad Assocs. v. Chicago Hous. Auth., 892 F.2d 583, 586 (7th Cir. 1989), cert. denied, 498 U.S. 845, 112 L. Ed. 2d 97, 111 S. Ct. 129 (1990). The court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party. Dimmig v. Wahl, 983 F.2d 86, 87 (7th Cir. 1993). A motion to dismiss will be granted only if it is clear that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, [*8] 78 S. Ct. 99 (1957).

A. Count I and Count II are Time-Barred

The statute of limitations for Section 1983 claims is the state law period for personal injury torts. Wilson v. Garcia, 471 U.S. 261, 280, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). Thus, because Illinois law provides a two-year statute of limitations for personal injury actions, 735 ILCS 5/13-202, Washington's various Section 1983 claims must have been brought within two years of those claims' accrual--that is, within two years of the date when the plaintiff [knew] or should [have known] that his or her constitutional rights [were] violated." Kelly v. City of Chicago, 4 F.3d 509, 511 (7th Cir. 1993).

Here, Count I of Washington's First Amended Complaint alleges that Washington was arrested on March 9, 1991 by Summerville and

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[5] This Court declines Defendants' requests to vacate Judge Williams' March 8, 1995 Order. The Court considers each of Defendants' substantive arguments with respect to their motion to dismiss.

another detective without a warrant and without probable cause. Count II alleges that Summerville, Foley and Capesius used excessive and coercive force in arresting and questioning Washington. These claims are deemed to have accrued at the time of Washington's arrest and questioning. Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995); Wilson v. Giesen, 956 F.2d 738, 740 [*9] (7th Cir. 1992); Booker v. Ward, 888 F. Supp. 869, 876 (N.D. Ill. 1995). Thus, because Washington's arrest and questioning occurred in March 1991, but this action was not filed until January 7, 1994--nearly three years later--, Count I and Count II are time-barred. While Washington cites the Supreme Court's decision in Heck v. Humphrey, U.S. , 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994) in support of the contention that his unlawful arrest and excessive force claims are timely, as those claims did not accrue until the date on which criminal charges against Washington were dropped--May 23, 1994--, Heck does not alter this Court's statute of limitations analysis for two fundamental reasons. First, Heck applies only where a plaintiff challenges the constitutionality of his conviction in a suit for damages under Section 1983. The Heck Court specifically held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct [*10] appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." Heck, 114 S. Ct. at 2372.

The Heck Court's recognition that a Section 1983 action premised on an unlawful conviction or imprisonment accrues only upon the invalidation of the conviction or sentence at issue is supported by "a strong judicial policy against the creation of two conflicting

resolutions arising out of the same or identical transactions." Id. at 2371. This policy concern is not implicated where a Section 1983 plaintiff has not, in fact, been convicted and/or sentenced to a term of imprisonment. Cooper v. Butler, 1995 U.S. App. LEXIS 4244, 1995 WL 151776 at *3 (N.D. Ill. April 4, 1995), reconsidered on other grounds, 1995 WL 399009 (N.D. Ill. June 29, 1995); Reed v. City of Chicago, 867 F. Supp. 714, 716 (N.D. Ill. 1994), aff'd, 1996 WL 106376, *1 (7th Cir. Mar. 12, 1996). Thus, because Washington was not convicted, the [*11] rule set forth in Heck is inapplicable to Washington's unlawful arrest and excessive force claims.

The second reason that Heck does not alter this Court's conclusion as to the untimeliness of Washington's Counts I and II is that, even if Washington had been convicted of first-degree murder, Washington's improper arrest and coercive force claims would not necessarily undermine the validity of that conviction. Perez, 57 F.3d at 505 (citing Heck, 114 S. Ct. at 2372 n.7; Smith v. Springer, 859 F.2d 31 (7th Cir. 1988)). Indeed, given that any attempt to hypothesize about the evidence which would have been presented at a trial and which might have formed the basis of a conviction would be, at worst, futile and, at best, highly speculative, Washington's assertion that his Section 1983 claims relating to his arrest and questioning would "imply the invalidity of a potential conviction" amount to little more than untestable theory.

Thus, because Washington's Counts I and II causes of action arose on March 9, 1991, these Counts, which were initially filed on January 7, 1994, are barred by the applicable two-year statute of limitations.

B. Counts III and VI Are Time-Barred and Fail to State Valid Claims For Relief

In Count III of his First Amended Complaint, Washington seeks damages pursuant to Section 1983 for malicious prosecution and

unlawful confinement in violation of the Fourth Amendment; and, in Count VI, Washington asserts a claim of malicious prosecution under Illinois common law. Both of these claims, like Washington's unlawful arrest and excessive force claims, are time-barred.[6]

Having converted the motion, the Court must decide the issues before it under the standards for summary judgment. A court will grant a motion for summary judgment "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, all ambiguities and reasonable inferences are to resolved against the moving party and in favor of the party opposing the motion. Roman v. U.S. Postal Service, 821 F.2d 382, 385 (7th Cir. 1987).

The Seventh Circuit's recent decision in Reed v. City of Chicago, 77 F.3d 1049, 1996 WL 106376, *1 (7th Cir. 1996) provides the framework for analyzing the timeliness of Washington's malicious prosecution claims. In Reed, the plaintiff asserted numerous Section 1983 claims--including unlawful arrest, unreasonable search and seizure, wrongful confinement, and malicious prosecution--against various Chicago police officers arising out of those officers' arrest of the plaintiff and subsequent testimony against the plaintiff before the

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[6] Because documents outside the pleadings, including hearing transcripts, are discussed by both parties in their various briefs and are required for the Court's consideration of Defendants' motion with respect to Counts III and VI, the Court converts Defendants' motion to dismiss Count III and Count VI into a motion for summary judgment. Tregenza v. Great American Communications Co., 12 F.3d 717, 718 (7th Cir. 1993), cert. denied, 128 L. Ed. 2d 465, 114 S. Ct. 1837 (1994); Venture Assocs. Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993).

grand jury and at trial. Initially, the district court held, and the Seventh Circuit confirmed, that the plaintiff's unlawful arrest, search and seizure claims were barred by the two-year statute of limitations. Next, the Seventh Circuit held that the plaintiff's malicious prosecution claim was similarly time-barred, as that claim was effectively identical to the plaintiff's unlawful arrest claim. The court explained:

So what do we have? At bottom, we have an allegation that the defendants lacked probable cause to arrest [the plaintiff] and charge him with murder. That is a claim for wrongful arrest. As [the plaintiff] concedes in his brief, [*14] this claim is time-barred. All that is left apart from that claim is the detectives' testimony before the grand jury and at the hearing on the motion to quash. [The plaintiff] did not allege that the detectives gave perjured testimony at these hearings, merely that they "testified." . . . In sum, there were no allegations that the detectives committed any improper acts after arresting [the plaintiff] without probable cause. We fail to see how this is malicious prosecution. Id. at *4-5. The court further noted:

> In her concurrence in Albright, Justice Ginsburg noted that a malicious prosecution action against police officers is "anomalous." As a general proposition, we agree. This is because the State's Attorney, not the police, prosecutes a criminal action. It is conceivable that a wrongful arrest could be the first step towards a malicious prosecution. However, the chain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor.

Id. at *5.

Here, Washington's malicious prosecution claims, like the malicious prosecution claims [*15] of the plaintiff in Reed, are premised on the allegations that the defendant detectives arrested

Washington without probable cause and subjected him to excessive and coercive force. Washington does not allege any impropriety on the part of Cawley, the Assistant State's Attorney, and Cawley is not named as a defendant. Thus, as in Reed, Washington's unlawful confinement and malicious prosecution claims are nothing more than additional claims for wrongful arrest and excessive force--claims which arose on the date of Washington's arrest, March 9, 1991, and which are, therefore, untimely.

Additionally, even if Washington's malicious prosecution counts were independent of his unlawful arrest and coercive force claims and were timely brought, those counts would fail because Washington cannot establish the required elements of a malicious prosecution claim. In order to state a Section 1983 claim for malicious prosecution, a plaintiff must (1) satisfy the requirements of a state law cause of action for malicious prosecution; (2) establish that the malicious prosecution was committed by state actors; and (3) establish that the malicious prosecution resulted in his arrest or seizure [*16] and thereby caused a deprivation of his liberty. Ingram v. Jones, 1995 U.S. Dist. LEXIS 18412, *18, 1995 WL 745849, at *5 (N.D. Ill. Nov. 29 1995). To state a claim for malicious prosecution under Illinois common law, a plaintiff must establish: "'(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff.'" Id. (quoting Meerbrey v. Marshall Field & Co., 139 Ill. 2d 455, 473, 564 N.E.2d 1222, 151 Ill. Dec. 560 (1990)). Further, for malicious prosecution claims based on criminal proceedings, the second element requires that the proceedings be terminated in a manner indicative of the plaintiff's innocence. Ingram, 1995 U.S. Dist. LEXIS 18412, *18, 1995 WL 745849, at *5. Thus, "where the case is disposed of in a manner that leaves the question of the accused's innocence unresolved, there generally can be no malicious prosecution claim by

the accused." Dobiecki v. Palacios, 829 F. Supp. 229, 235 (N.D. Ill. 1993).

Where, as here, the dismissal of criminal charges against the Section 1983 plaintiff was [*17] prompted by the suppression of inculpatory statements, the determination as to whether the dismissal is indicative of innocence turns on the question of whether the statements were excluded because of their unreliability:

> The better rule is that the particular circumstances of each case must be considered to determine whether the dismissal following suppression of evidence should be indicative of innocence. If the circumstances show that unreliable evidence has been suppressed and the prosecution then abandons the case because of lack of sufficient reliable evidence, that would be a circumstance where the dismissal is indicative of innocence, just as any dismissal for lack of proof is generally considered indicative of innocence. If a confession is suppressed because involuntarily coerced, then the evidence was not reliable and a subsequent voluntary dismissal based on lack of evidence would be indicative of innocence. On the other hand, if the evidence was only suppressed on "technical" grounds having no or little relation to the evidence's trustworthiness, then the fact that there was not other sufficient evidence would not be indicative of innocence.

Id. at 235-36 [*18] (citations omitted).

In the present case, a review of the criminal trial record reveals that the trial court's suppression of Washington's inculpatory statements was based on "technical" grounds--rather than on a specific finding that those statements were coerced.

On July 12, 1993, the trial court, after a thorough and detailed discussion of the extensive testimony given during the hearing on the

motion to suppress, denied the motion, finding unbelievable Washington's testimony that his statements were involuntarily coerced. (7/12/93 Transcript of Proceedings, pp. 60-61.)

On September 16, 1993, the trial court entertained Washington's motion for rehearing and, after a careful review of the testimony given during the hearing on the original motion to suppress, determined that the initial finding as to the voluntariness and reliability of Washington's statements was proper. Accordingly, the trial court again denied Washington's motion to suppress. (9/16/93 Transcript of Proceedings, pp. HH-15.) Then, on September 22, 1993, the trial court considered yet another motion for rehearing and, after hearing the testimony of a new witness whose credibility the court seriously questioned, [*19] once more denied Washington's suppression motion.

Finally, on March 4, 1994, on Washington's third motion for rehearing, the trial court determined, after an in camera review of Summerville's medical records, that information contained in those records warranted reopening the motion to suppress. Specifically, the trial court held that another hearing was required to permit Washington to cross-examine Summerville on his purported substance abuse problems and other criminal activities. At this point, the trial court apparently was informed that Summerville would exercise his Fifth Amendment rights if called to testify at a hearing. Faced with Summerville's silence, the trial court concluded, "Given the Court's findings that there is relevant inquiry that the Defendant in this case is entitled to inquire into and the fact that the witness refuses to testify pursuant to his own constitutional rights, the Court has no choice, therefore, but to grant the motion to suppress the statements." (3/4/94 Transcript of Proceedings, pp. 5-7.)

The trial court never found--not on July 12, 1994; September 16, 1993; September 22, 1993; or March 4, 1994--that Washington's inculpatory statements [*20] resulted from the use of unlawful and

excessive force against him by Summerville, Foley, Capesius or any other detective. Rather, the trial court concluded that admitting the inculpatory statements without permitting Washington fully to cross-examine Summerville--including as to Summerville's alleged substance abuse and other criminal conduct--would run afoul of Washington's constitutional rights. Thus, because the trial court's suppression of Washington's statements was premised on "technical" grounds, and not on a finding of involuntariness or unreliability, the subsequent dismissal of charges against Washington left the question of Washington's innocence unresolved, and, consequently, Washington cannot state a valid claim for malicious prosecution.

C. Count IV Fails to State a Valid Conspiracy Claim

Count IV of Washington's First Amended Complaint alleges that Summerville, Foley, Capesius and other unnamed detectives conspired to deprive Washington of his Constitutional rights; yet, each of the overt, unlawful acts allegedly committed by the detectives is either time-barred or subject to the detectives' absolute immunity.

Plaintiffs in civil conspiracy actions are permitted [*21] "to recover only for overt acts alleged to have occurred within the applicable limitation period. . . ." Scherer v. Balkema, 840 F.2d 437, 440 (7th Cir.), cert. denied, 486 U.S. 1043, 100 L. Ed. 2d 620, 108 S. Ct. 2035 (1988); see also Martin v. Anderson, 1991 U.S. Dist. LEXIS 14194, 1991 WL 211243, at *2 (N.D. Ill. Oct. 1, 1991). Here, with the exception of the detectives' alleged giving of false testimony, every one of the improper acts allegedly committed by Defendants in furtherance of the conspiracy--use of excessive and coercive force, unlawful arrest, wrongful imprisonment, and failure to prevent harm--occurred in March 1991, nearly three years before Washington filed his original Complaint. These acts are, therefore, untimely in light of the applicable two-year statute of limitations, and, consequently, Washington may not recover for these acts under

a civil conspiracy theory. Further, Summerville, Foley and Capesius are absolutely immune from suit with respect to their testimony before the grand jury and at the hearing on the motion to suppress. Curtis v. Bembenek, 48 F.3d 281, 284 (7th Cir. 1995); Kincaid v. Eberle, 712 F.2d 1023, 1023-24 (7th Cir.), cert. denied, 464 U.S. 1018, [*22] 78 L. Ed. 2d 725, 104 S. Ct. 551 (1983). Accordingly, Washington's allegations of perjury are insufficient state a cognizable Section 1983 conspiracy claim. Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988); Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985).[7]

D. Count V is Time-Barred

Count V is a claim under Illinois law for [*23] intentional infliction of emotional distress. Unlike the Section 1983 claims, Washington's intentional infliction claim is subject to the one-year statute of limitations that applies to claims involving a municipality and its employees. 745 ILCS 10/8-101; see also Antonelli v. Zvokel, 1994 U.S. Dist. LEXIS 14018, 1994 WL 542765, at *3 (N.D. Ill. Oct. 3, 1994). Because the alleged acts giving rise to Washington's claim for intentional infliction--unlawful arrest, wrongful imprisonment, and use of excessive and coercive force--occurred in

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[7] Washington alleges that Defendants conspired to deny him access to the courts. Such a claim only exists where police officials shield from the plaintiff key facts which would form the basis of the plaintiff's claims for redress. Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984). Here, Washington does not, and cannot, allege that key facts which would form the basis of his Section 1983 and state law claims were concealed from him; indeed, the events which gave rise to Washington's unlawful arrest, excessive force, malicious prosecution, and intentional infliction of emotional distress claims were well-known to him at the time of their occurrence.

March 1991, but this action was not filed until January 7, 1994--nearly three years later--, Count V is time-barred.[8]

E. Counts VII and VIII Fail to State Valid Claims for Relief.

Count VII of Washington's First Amended Complaint alleges that the City bears respondeat superior liability for the acts of Summerville, Foley and/or Capesius which violated Illinois state law. Because this Court has already concluded that (1) Washington's claim for intentional infliction of emotional distress is time-barred, and (2) his claim for malicious prosecution is both time-barred and legally deficient, Washington's respondeat superior count fails to state a claim upon which relief can be granted.

Count VIII, which alleges that the City is liable for any judgments against Summerville, Foley and/or Capesius under 745 ILCS 10/9-102, is similarly deficient. Section 10/9-102 requires a local government entity to pay any tort judgments or settlements for compensatory damages entered against an employee acting within the scope of his or her employment. Because this Court dismisses each and every substantive claim contained in Washington's First Amended Complaint, no judgment can, or will, enter against the detectives, and, accordingly, the City cannot, and will not, be liable to Washington under Section [*25] 10/9-102.

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[8] That Washington includes a conspiracy allegation in his claim for intentional infliction of emotional distress does not render the claim timely. As previously indicated, other than the detectives' alleged giving of false testimony before the grand jury and at the hearing on the motion to suppress--actions which are subject to the detectives' absolute immunity--, Washington alleges no acts which might bring the alleged conspiracy within the limitations period.

CONCLUSION

For the foregoing reasons, this Court (1) grants Defendants' motion to dismiss Counts I, II, IV, V, VII and VIII, and (2) grants summary judgment to Defendants on Counts III and VI. Defendants' motion to vacate Judge Williams March 8, 1995 Order is denied.

ENTER:

George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: April 3, 1996

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE WASHINGTON	)	
	)	
Plaintiff,	)	**No. 94 C 203**
	)	
vs.	)	**Judge Williams**
	)	
JOHN SUMMERVILLE, star # 16520, PATRICK FOLEY, star #20143, and JAMES CAPESIUS, star #20527, Chicago Police Officers, and the CITY OF CHICAGO,	)	
	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

JURISDICTION

1. The jurisdiction of the court is invoked pursuant to the Civil Rights Act, 42 U.S.C. Sec. 1983 et seq.; the judicial code, 28 U.S.C. Sec. 1331 and 1343(a); and supplementary jurisdiction, as codified in 28 U.S.C. 1367(a).

PARTIES

2. Plaintiff George Washington is an African-American citizen of the United States and a resident of the State of Illinois.

3. Defendant Detectives John Summerville, Patrick Foley and James Capesius were, at all relevant times, duly appointed and sworn City of Chicago police officers who were assigned to the Detective Division, Area IV Violent Crimes, and who engaged in the conduct complained of in the course and scope of their employment

and under color of law. These defendants are sued in their individual capacity.

4. Defendant City of Chicago is a municipal corporation, duly incorporated under the laws of the State of Illinois, and at all times relevant to this complaint was the employer of defendants Summerville, Foley and Capesius.

FACTS

5. On March 9, 1991, plaintiff was arrested by defendant Summerville and another detective in the vicinity of Cermak Road and Fairfield Street in the City of Chicago.

6. At the time of this arrest there was no warrant for plaintiff's arrest, and there was no probable cause to arrest him.

7. In the course of this arrest defendant Summerville hit plaintiff's head against the trunk of a car.

8. Plaintiff was then taken to Area IV detective headquarters at 3151 W. Harrison, Chicago, Illinois, where defendant Summerville pushed plaintiff's head against the wall, knocking plaintiff unconscious.

9. Subsequently, defendant Summerville handcuffed plaintiff to a wall in an interrogation room and then struck plaintiff in the throat, demanding that plaintiff make an inculpatory statement.

10. When plaintiff said he did not know what Summerville was talking about, Summerville left the interrogation room.

11. Defendant Foley then entered the room and told plaintiff that if he did not cooperate his treatment would get worse. When plaintiff said that he did not understand what Foley was talking about defendant Foley struck plaintiff across the face with his hand.

12. Later, defendant Summerville reentered the room and demanded that plaintiff make a statement to the state's attorney in conformity with what Summerville ordered him to say. When plaintiff said that he did not know what Summerville was talking about, Summerville kicked him in the groin several times.

13. Summerville then left the room, but subsequently returned with an unknown person and demanded that plaintiff give

a statement. Plaintiff again stated that he did not know what defendant Summerville was talking about.

14. Defendant Summerville and the unknown person then left the room and Summerville returned with a big flashlight. When plaintiff still refused to say what Summerville wanted him to say, Summerville struck him in the ribs with the flashlight.

15. Summerville left the room and defendant Capesius entered and told plaintiff that if he kept resisting he was going to get worse treatment.

16. Later, defendant Summerville and assistant state's attorney Michael Cawley entered the room and then left.

17. Defendant Summerville then came back into the room and told plaintiff that he would tell him what he wanted him to say. When the plaintiff refused to do this defendant Summerville struck him with a flashlight in the ribs several times. After this further abuse plaintiff agreed to say what Summerville told him to say.

18. Defendant Summerville then left the room and returned with assistant state's attorney Cawley and plaintiff repeated the inculpatory statements that Summerville had ordered him to say.

19. Defendants Foley and Capesius were present at Area IV while the questioning and physical abuse by Summerville was continuing, and were aware that plaintiff was being physically abused but failed to stop the unlawful conduct although each was able to do so.

20. The defendants then caused plaintiff to be charged with murder and to be imprisoned, without probable cause, pending trial.

21. The false and unlawfully obtained evidence generated by defendants Summerville, Foley and Capesius was a proximate cause of the plaintiff being charged with murder and imprisoned pending trial.

22. In the course of the criminal proceedings against him, plaintiff moved to suppress his alleged inculpatory statements on the grounds that they were a product of physical abuse and coercion.

23. This motion was eventually granted and the alleged inculpatory statements suppressed.

24. On or about May, 1994, the criminal charges against the plaintiff were dropped and he was released from custody.

25. The acts of defendants in striking, kicking and otherwise physically abusing plaintiff, and unlawfully obtaining and fabricating evidence caused plaintiff loss of his liberty, companionship and income, as well as causing him physical injury, physical and mental pain and suffering, and mental anguish.

COUNT I

26. Plaintiff realleges paragraphs 1 through 25.

27. The defendant detectives' illegal arrest of the plaintiff, without probable cause, was an unconstitutional seizure in violation of the Fourth Amendment to the United States Constitution, and was a direct and proximate cause of plaintiff's illegal confinement and imprisonment for over three years, his wrongful prosecution, as well as his physical injuries and pain and suffering and the other injuries set forth above.

WHEREFORE, plaintiff George Washington demands judgment against defendant Summerville for substantial compensatory damages, and, because he acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for substantial punitive damages, plus the costs of this action, attorneys' fees and such other relief as this Court deems equitable and just.

COUNT II

28. Plaintiff realleges paragraphs 1 through 25.

29. The defendant detectives' excessive and coercive use of force and their failure to prevent the use of said force, having the opportunity and duty to do so, was an unreasonable and unconstitutional seizure in violation of the Fourth Amendment to the United States Constitution, and was a direct and proximate cause of plaintiff's illegal confinement and imprisonment for over three years, his wrongful prosecution, as well as his physical injuries and pain and suffering and the other injuries set forth above.

WHEREFORE, plaintiff George Washington demands judgment against defendants John Summerville, Patrick Foley and

James Capesius jointly and severally, for substantial compensatory damages and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for substantial punitive damages, plus the costs of this action, attorneys' fees and such other relief as this Court deems equitable and just.

COUNT III

30. Plaintiff realleges paragraphs 1 through 25.

31. The wrongful confinement and prosecution of the plaintiff without probable cause, and the resultant injuries and damages, were proximately caused by the unconstitutional acts of the defendant detectives set forth above, in violation of the Fourth and/or Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiff George Washington demands judgment against defendants Summerville, Capesius and Foley, jointly and severally, for substantial compensatory damages and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for substantial punitive damages, plus the costs of this action, attorneys' fees and such other relief as this Court deems equitable and just.

COUNT IV

32. Plaintiff realleges paragraphs 1 through 25

33. Defendants Summerville, Foley and Capesius, with other unnamed detectives, police supervisory personnel, together and under color of law, reached an understanding, engaged in a course of conduct, and otherwise conspired among and between themselves to deprive the plaintiff of his Constitutional rights, and did deprive him of said rights, including his right to be free from wrongful confinement and imprisonment, and his right to access to the Courts, as protected by the Fourth and Fourteenth Amendments to the United States Constitution.

34. In furtherance of this conspiracy, the defendants committed the overt acts set forth above, including, but not limited to, the repeated unjustifiable, excessive and coercive use of force against, and otherwise oppressive treatment of, plaintiff at Area IV; the failure to prevent harm to him; the coercion of a statement from

him; the supervision, encouragement and/or acquiescence in said acts; the wrongful imprisonment and prosecution of plaintiff; the filing of false and incomplete statements and reports; the use of the statement illegally obtained from plaintiff to wrongfully charge, imprison and prosecute him; the giving of false testimony at the grand jury and the motion to suppress, and the cover-up of all this misconduct. Said conspiracy is further evidenced by the other acts of torture, brutality and coercion to obtain statements from suspects, cover up said acts, and the wrongful arrests, imprisonments and convictions which these defendants participated in, encouraged, and/or condoned while detectives at Area IV.

35. Said conspiracy and overt acts caused said constitutional violations, and said injuries, pain, suffering, mental anguish, incarceration, conviction, imprisonment, and loss of freedom, companionship, and income, as set forth above.

WHEREFORE, plaintiff George Washington demands judgment against defendants Summerville, Folley and Capesius jointly and severally, for substantial compensatory damages, and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for substantial punitive damages, plus the costs of this action, attorneys' fees and such other relief as this Court deems equitable and just.

COUNT V

36. Plaintiff realleges paragraphs 1 through 25.

37. The conduct and actions of defendants Summerville, Capesius and Foley as set forth above, both individually, and/or jointly and in conspiracy, constitute intentional infliction of emotional distress.

WHEREFORE, plaintiff demands judgment against defendants Summerville, Foley and Capesius jointly and severally, for substantial compensatory damages, plus punitive damages, the costs of this action, and whatever additional relief this Court finds equitable and just.

COUNT VI

38. Plaintiff realleges paragraphs 1 through 25.

39. Defendants Summerville, Capesius and Foley individually and/or jointly and in conspiracy, initiated and continued a malicious prosecution, without probable cause, against plaintiff. Said prosecution was ultimately determined in plaintiff's favor.

40. These actions directly and proximately caused the injuries and damages to plaintiff as claimed above, and constitute the tort of malicious prosecution under Illinois law.

WHEREFORE, plaintiff demands judgment against defendants Summerville, Capesius and Foley jointly and severally, for substantial compensatory damages, plus punitive damages, the costs of this action, and whatever additional relief this Court finds equitable and just.

COUNT VII

41. Plaintiff realleges paragraphs 1 through 25.

42. The defendant police officers were, at all times material to this complaint, employees of the defendant City of Chicago, were acting within the scope of their employment, and their acts which violated state law are directly chargeable to the defendant City under state law pursuant to respondeat superior.

WHEREFORE, plaintiff demands judgment for compensatory damages against the City of Chicago, the costs of this action and whatever additional relief this Court deems equitable and just.

COUNT VIII

43. Plaintiff realleges paragraphs 1 through 25.

44. Defendant City of Chicago was the employer of defendant police detectives Summerville, Foley and Capesius at all times relevant to this complaint.

45. These defendants committed the acts alleged above under color of law and in the scope of their employment as employees of the City of Chicago.

WHEREFORE plaintiff George Washington, pursuant to 745 ILCS 10/9-102, demands judgment against the defendant City of Chicago in the amounts awarded to plaintiff against the individual defendants as damages, attorneys' fees, costs and interest, and for

whatever additional relief this Court deems equitable and just.

Respectfully submitted,

Dated: March 9, 1995

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Plaintiff demands a jury on all counts.

No. 97-1324

FILED
MAR 16 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE WASHINGTON,
Petitioner,

v.

JOHN SUMMERVILLE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a cause of action alleging an unreasonable seizure accrues at the time the seizure occurs, or only when criminal proceedings arising out of that seizure terminate.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-21a) is reported at 127 F.3d 552 (7th Cir. 1997). The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 22a-37a) is unreported.

STATEMENT

On March 9, 1991, two detectives of the Chicago Police Department, including respondent John Summerville, stopped an automobile near the intersection of Cermak Road and Fairfield Street in the City of Chicago. R. 12 at ¶ 5. *See also* R. 1 at 5. They arrested petitioner George Washington, who was a passenger in the automobile. R. 1 at 5; R. 12 at ¶ 5. Petitioner alleges that, during the arrest, Detective Summerville hit petitioner's

head against the trunk of the car. R. 12 at ¶ 7. Petitioner was then taken to the Area IV headquarters of the Chicago Police Department. R. 12 at ¶ 8.

Upon their arrival at Area IV headquarters, the detectives took petitioner to an interrogation room. R. 12 at ¶ 9. Petitioner contends that the detectives then hit his head against a wall of the interrogation room, knocking him unconscious. R. 12 at ¶ 8. Petitioner alleges that sometime later, he was handcuffed to the interrogation room wall. R. 12 at ¶ 9. According to petitioner, Detective Summerville then struck him in the throat and demanded that he make a statement. R. 12 at ¶ 10. Petitioner stated that he "did not know what Summerville was talking about," and Detective Summerville left the room. R. 12 at ¶ 10.

According to petitioner, respondent Patrick Foley, another detective, then entered the interrogation room. R. 12 at ¶ 11. Petitioner alleges that Detective Foley told him that his treatment would become worse if he did not cooperate. R. 2 at ¶ 11. Petitioner claims that he told Detective Foley that he did not know what he was talking about, and Detective Foley hit him in the face. R. 12 at ¶ 11. Detective Summerville reentered the room. R. 12 at ¶ 12.

Petitioner further alleges that Detective Summerville next told him to make a statement to the state's attorney. R. 12 at ¶ 12. When petitioner told Detective Summerville that he did not know what he was talking about, Detective Summerville allegedly kicked petitioner in the groin. R. 12 at ¶ 14. According to petitioner, Detective Summerville left and, after some time, returned, again requesting a statement. R. 12 at ¶ 13. When petitioner refused, Detective Summerville left the interrogation room. R. 12 at ¶ 14. According to petitioner, Detective Summerville reurned with a "big flashlight." R. 12 at ¶ 14. Petitioner alleges that when he again refused to make a statement, he was hit in the ribs with the flashlight. R. 12 at

¶¶ 14, 15. After Detective Summerville left the interrogation room, respondent James Capesius, another Chicago police detective, entered. R. 12 at ¶ 15. Petitioner contends that Detective Capesius told him that his treatment would become worse if he continued to refuse to cooperate. R. 12 at ¶ 15. Petitioner was told that he should give a statement, repeating what Detective Summerville told him to say. R. 12 at ¶ 17. Petitioner alleges that Detective Summerville hit him in the ribs when he refused to do so. R. 12 at ¶ 17.

Petitioner then allegedly agreed to give a statement. R. 12 at ¶ 17. Detective Summerville returned to the interrogation room with the assistant state's attorney. R. 12 at ¶ 18. Petitioner then made statements to the assistant state's attorney. R. 12 at ¶ 18.

On April 5, 1991, Washington was indicted on charges of murder. R. 12 at ¶ 21. *See also* R. Loose Pleadings (vol. 3) at Exh. 2. Petitioner filed a motion to suppress the statements that he made to the assistant state's attorney. R. 12 at ¶ 22. The state court denied petitioner's motion after extensive testimony. R. 32 at 2. *See also* R. Loose Pleadings (vol. 2) at Exh. F. The state court determined that petitioner's account of what occurred during the arrest and questioning was not credible. R. Loose Pleadings (vol. 2) at Exh. F. Petitioner moved for reconsideration of the court's decision on or about September 16, 1993 and September 22, 1993. *See* R. Loose Pleadings (vol. 2) at Exh. G. The state court denied both motions. R. 32 at 2-3.

On October 12, 1993, at the prompting of the court, Washington filed a third motion for reconsideration, based on newspaper reports that Detective Summerville was receiving treatment for substance abuse. R. 32 at 3. R. Loose Pleadings (vol. 2) at Exh. H. See *also* R. Loose Pleadings (vol. 3) at Exh. 6. On March 4, 1994, the court held a hearing on the motion. *See* R. Loose Pleadings (vol. 2) at Exh. I. After examining records related

to Detective Summerville's substance abuse problems, the court ordered that petitioner's motion to reconsider be reopened. R. Loose Pleadings (vol. 2) at Exh. I. The court went on to consider petitioner's motion to suppress. The court noted that, according to counsel for Detective Summerville, the detective would assert his Fifth Amendment privilege against compelled self-incrimination in response to any questions pertaining to his substance abuse. R. 32 at 3. *See* R. Loose Pleadings (vol. 2) at Exh. I. Given the information before it, the court determined that "there is relevant inquiry that the Defendant in this case is entitled to inquire into and . . . the witness refuses to testify pursuant to his constitutional rights." R. Loose Pleadings (vol. 2) at Exh. I at 7. The court then granted petitioner's motion to suppress his statements to the assistant state's attorney. R. 12 at ¶ 23; R. 32 at 3. See R. Loose Pleadings (vol. 2) at Exh. I. Then, on May 23, 1994, the state court granted the prosecution's motion for a nolle prosequi, dropping the charges against petitioner. R. 32 at 3.

On January 7, 1994, petitioner filed a federal civil rights action pursuant to 42 U.S.C. § 1983, naming as defendants the State's Attorney for Cook County, Illinois, Jack O'Malley, Assistant State's Attorney Michael Cawley, and Detectives Summerville, Foley, and Capesius. R. 1. On April 29, 1994, the district court ordered petitioner to show cause why his action was not untimely under the appropriate statute of limitations. R. 5. When no response was received, the district court dismissed the action on June 9, 1994. R. 6, 7. Nine months later, counsel for petitioner moved for relief from that judgment. R. 9, 11. The court granted petitioner's motion in an order dated March 8, 1995. R. 10.

On March 9, 1995, petitioner filed an amended complaint, again under Section 1983, asserting federal civil rights and state-law claims against Detectives Summerville, Foley, and Capesius, and the City of Chicago. R. 12. In count I, petitioner alleged that the detectives arrested

him without probable cause in violation of the Fourth Amendment. R. 12 at ¶¶ 26, 27. Petitioner alleged in count II that the detectives used or failed to prevent the use of excessive force against him during his arrest, also in violation of the Fourth Amendment. R. 12 at ¶¶ 28-29. In count III, petitioner alleged that he was wrongly confined and prosecuted in violation of his Fourth and Fourteenth Amendment rights. R. 12 at ¶¶ 30-31. In count IV, petitioner claimed that the detectives conspired to deprive him of his rights under the Fourth and Fourteenth Amendments. R. 12 at ¶¶ 32-35. Petitioner's remaining claims were brought under state law for intentional infliction of emotional distress, malicious prosecution, and for imposition of vicarious liability on the City as the detectives' employer. R. 12 at ¶¶ 36-45.

On April 3, 1996, the district court entered judgment against petitioner. The district court concluded that petitioner had filed his claims for unlawful arrest (count I) and use of excessive force (count II) after the expiration of the two-year statute of limitations applicable to Section 1983 claims in Illinois. Pet. App. 26a-28a. The district court also ruled that petitioner's federal malicious prosecution claim (count III) alleged no constitutional violation other than the time-barred Fourth Amendment claims, and, accordingly, dismissed it on limitations grounds as well. Pet. App. 28a-31a. Moreover, since the allegations underlying petitioner's conspiracy claim were not timely, the conspiracy claim was also dismissed. Pet. App. 34a-35a. The district court added as well that petitioner had failed to establish that his prosecution in state court had been terminated in a manner inconsistent with his innocence, a defense to both the federal and state-law malicious prosecution claims. Pet. App. 31a-34a. The district court also dismissed petitioner's remaining state-law claims on limitations and other grounds. Pet. App. 35a-36a. Petitioner appealed.

On September 17, 1997, the court of appeals affirmed. Following its prior opinion in *Booker v. Ward*, 94 F.3d

1052 (7th Cir. 1996), cert. denied, 117 S. Ct. 952 (1997), the court concluded that Fourth Amendment claims alleging an arrest without probable cause or the use of excessive force accrue when those constitutional violations occur, and not when a related state-court prosecution ultimately terminates, since Fourth Amendment claims are not necessarily inconsistent with the validity of a pending charge against the federal plaintiff. Pet. App. 5a-9a. The court also held that petitioner's federal malicious prosecution claim alleged no constitutional violation other than the time-barred Fourth Amendment claim, and for that reason encountered the same limitations bar. Pet. App. 12a-16a. The court added that petitioner's state-law malicious prosecution claim was insufficient because he could not establish that his prosecution had been terminated in a manner indicative of his innocence. Pet. App. 10a-12a. Judge Rovner concurred in part and dissented in part. She agreed that petitioner's unlawful arrest and excessive force claims were time-barred (Pet. App. 16a), but concluded that petitioner's federal and state-law malicious prosecution claims were meritorious. Pet. App. 16a-21a.

ARGUMENT

Although petitioner claims that he was arrested without probable cause and subjected to the use of excessive force during the course of that arrest and the interrogation following it, all in violation of the Fourth Amendment, he failed to bring suit for nearly three years after his arrest and interrogation. This was beyond the two-year limitations period for Section 1983 actions in Illinois. Petitioner's sole complaint about the Seventh Circuit's decision holding these claims to be time-barred rests on the happenstance that he was prosecuted in state court as a consequence of his arrest. Thus, he claims that he was unable to bring suit for the violations of the Fourth Amendment he has alleged until the charges against him were dismissed. For this, he relies on this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), holding

that a Section 1983 claim often cannot be brought if it necessarily contests the validity of a state court's judgment. The court of appeals sensibly rejected that submission on the straightforward basis that petitioner's ability to recover for a constitutionally unreasonable arrest does not turn on whether he was later convicted on any charges brought against him stemming from that arrest. The guilty and innocent alike are entitled to recover if they are arrested without probable cause or subjected to excessive force within the course of that arrest. It is for that reason that petitioner's claims, even if ultimately successful, would not be inherently inconsistent with the validity of the charges against him or even an ensuing conviction, and thus, that they accrued when the constitutional violations occurred.

1. The general rule is that a cause of action accrues and the limitations period begins running when the plaintiff learns of an illegal act, and not when its consequences are felt. See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Here, the alleged violations of the Fourth Amendment occurred at the time of petitioner's arrest on March 9, 1991. Petitioner, however, did not sue the detectives who participated in his allegedly unconstitutional arrest and interrogation until January 7, 1994. The statute of limitations for Section 1983 claims arising in Illinois is two years. See, *e.g.*, *Farrell v. McDonough*, 966 F.2d 279, 282 (7th Cir. 1992), cert. denied, 506 U.S. 1084 (1993); *Kalimara v. Illinois Department of Corrections*, 879 F.2d 276, 277 (7th Cir. 1989). Since petitioner did not sue Detectives Summerville, Foley, and Capesius within two years of their allegedly unconstitutional arrest and interrogation of him, and since petitioner plainly knew of their involvement in that arrest and interrogaton and hence was able to bring suit within the limitations period, the court of appeals quite naturally concluded here that petitioner's claims against them under the Fouth Amendment were time-barred.

Petitioner nevertheless argues that he overcame this limitations problem because, under his reading of *Heck v. Humphrey*, his Fourth Amendment claims did not accrue until the criminal case against him was dismissed. See Pet. 6-8. In *Heck*, this Court held that Section 1983 claims that would have the effect of rendering the plaintiff's conviction or sentence invalid do not accrue until the conviction or sentence has been vacated. See 512 U.S. at 489-90. The Court reasoned that when the plaintiff, in order to prevail on his Section 1983 claim, would have to "negate an element of the offense of which he has been convicted," a Section 1983 claim goes to the validity of the criminal conviction and cannot properly be raised while the judgment of conviction remains outstanding. See *id.* at 486 n.6. Accordingly, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. The Court made clear, however, that its holding did not bar all Section 1983 claims by those who remain in custody as the result of criminal charges: "If the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should . . . proceed. . . ." *Id.* (emphasis in original).

Heck accordingly bars only claims that necessarily impugn the validity of a conviction. See *Edwards v. Balisok*, 117 S. Ct. 1584, 1587-88 (1997). Petitioner was of course never convicted, but the court of appeals agreed with him that the holding of *Heck* applies to pending charges no less than outstanding convictions. Following *Smith v. Holtz*, 87 F.3d 108 (3d Cir.), cert. denied, 117 S. Ct. 611 (1996), the court reasoned that petitioner's cause of action would not accrue under *Heck* while charges were pending against him if his Section 1983 claims "would necessarily imply the invalidity of a potential conviction on the murder charge against him."

Pet. App. 8a. But the court of appeals concluded that petitioner's claims of an allegedly unconstitutional arrest and interrogation accrued when those violations occurred, and not later, because these Fourth Amendment claims are not necessarily inconsistent with the validity of a pending charge. See Pet. App. at 8a-9a; see also *Booker v. Ward*, 94 F.3d at 1056-57.

This holding was correct. The fact that a case against an arrestee was initiated by an unreasonable search or seizure does not necessarily mean that any charges brought against the person searched and seized—or a subsequent conviction—are invalid. If the prosecution can adduce sufficient evidence not tainted by the Fourth Amendment violation, it can sustain both the charges and an ensuing conviction. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court made the point quite clearly. "[T]he established rule [is] that an illegal arrest or detention does not void a subsequent conviction." *Id.* at 119. The Court reiterated in *United States v. Crews*, 445 U.S. 463 (1980), that "[a]n illegal arrest, without more, has never been viewed . . . as a defense to a valid conviction." *Id.* at 474. In *Haring v. Prosise*, 462 U.S. 306 (1983), the Court held that a prisoner's action to recover for an illegal search and seizure was not barred by his plea of guilty to possessing items found in the search because the validity of the conviction "is simply irrelevant to the legality of the search under the Fourth Amendment or Prosise's right to compensation from state officials under § 1983." *Id.* at 316. And in *Heck* itself, the Court offered as an example of the type of claim that would not impugn the validity of a conviction "a suit for damages attributable to an allegedly unreasonable search . . . even if the challenged search produced evidence that was introduced in a state criminal trial. . . ." 512 U.S. at 187 n.7. As the Court explained, "[b]ecause of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *neces-*

sarily imply that the plaintiff's conviction was unlawful." *Id.* (emphasis in original) (citations omitted).

Indeed, the notion that persons accused of crimes can recover for violations of their Fourth Amendment rights only if and when they are ultimately acquitted is a radical and indefensible interpretation of that Amendment. The Fourth Amendment provides, without qualification, that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated" (U.S. Const. amend. IV). This text makes insupportable any claim that only persons found innocent of any wrongdoing are protected from unreasonable searches and seizures. Indeed, cases such as *Haring v. Prosise* make clear that even those who admit their guilt can recover from violations of their Fourth Amendment rights. Those rights exist wholly apart from the disposition of criminal proceedings against the person aggrieved by an unreasonable search and seizure, and hence such a person need not wait for criminal proceedings to conclude before his cause of action accrues.[1]

Petitioner nevertheless argues that under *Heck* "there must be an individualized inquiry in each case to determine whether a holding in favor of the plaintiff in the civil case would be necessarily inconsistent with the plaintiff's conviction." Pet. 6. But *Heck* requires that a Section 1983 claim "necessarily imply" the invalidity of a

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[1] In *Albright v. Oliver*, 510 U.S. 266 (1994), Justice Ginsburg expressed the view that an individual arrested without probable cause is subjected to a "continuing seizure" that does not end until the prosecution terminates, and that only then does the limitations period begin to run. See *id.* at 277-80 (concurring opinion). Petitioner has never advanced a "continuing seizure" theory during this litigation. Moreover, this theory has never been embraced by a majority of the Court, and has been rejected by a number of circuits. See, *e.g.*, *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 (4th Cir. 1996); *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir.), cert. denied, 509 U.S. 905 (1993).

charge or conviction for its accrual to be delayed, and here, petitioner's argument is not based on any necessary relationship between the alleged Fourth Amendment violations and the validity of the charge against him; as we explain above, the charge against him was valid regardless whether the prosecution intended to introduce evidence against him at trial that might be the fruit of a Fourth Amendment violation. Nor is the validity of a charge undermined by any decision a judge may later make to suppress some of the prosecution's evidence, or even by a prosecutor's subsequent decision to dismiss a charge voluntarily. Because a claim that evidence the prosecution intends to use at trial is the product of an unconstitutional search or seizure does not require the dismissal of a pending charge, such a claim is not necessarily inconsistent with that charge and hence has accrued under *Heck*.[2]

2. Petitioner claims that the Seventh Circuit's holding in this case is contrary to the law of no fewer than seven other circuits. See Pet. 8-9. Most of the cases that petitioner cites, however, are readily reconciled with the holding below.

For example, the decision in *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996) (per curiam), actually embraces the reasoning of the Seventh Circuit here. Smithart claimed that he had been subjected to excessive force during the course of an arrest that resulted in his criminal conviction. Although the court observed that *Heck* bars his claims "[t]o the extent that Smithart seeks to invalidate his assault conviction" (*id.* at 952). It went on to observe that his claim of excessive force had in fact accrued because "a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart's arrest or conviction" (*ibid.*). Similarly, although peti-

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[2] While petitioner correctly observes that Heck himself made some Fourth Amendment claims (see Pet. 6), the Court was careful to note in *Heck* that the only question before it "was whether money damages premised on an unlawful conviction could be pursued under § 1983." 512 U.S. at 480 n.2.

tioner does not mention the decision, in *Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996), the court also took the approach of the Seventh Circuit, reasoning that a claim of arrest without probable cause is not inherently inconsistent with the validity of a conviction even if evidence derived from the arrest is utilized to obtain that conviction. See *id.* at 182-83. See also *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995) (assuming that an excessive force claim did not go to the validity of a conviction and hence accrues when misconduct occurs). Cf. *Simmons v. O'Brien*, 77 F.3d 1093, 1094-97 (8th Cir. 1996) (Fifth Amendment claim of coerced confession accrued at the time confession was obtained).

Two of the other cases petitioner cites are about so-called malicious prosecution claims, and not claims alleging arrest without probable cause or the use of excessive force during an arrest. In *Calero-Colon v. Betancort-Lebron*, 68 F.3d 1 (1st Cir. 1995), the plaintiffs sued for malicious prosecution and each claimed that he "did not know the true nature and extent of the scheme that led to arrest until after he had been acquitted." *Id.* at 2. Under those circumstances, the court held that their cause of action did not accrue until acquittal. See *id.* at 3-4. In *Whiting v. Traylor*, 85 F.3d 581 (11th Cir. 1996), the plaintiff also brought a Section 1983 action for "malicious prosecution," and the court concluded that because malicious prosecution actions depend on the outcome of the state court proceedings, such a cause of action does not accrue until state proceedings terminate. See *id.* at 585-86. Assuming that there is a cause of action for a "malicious prosecution" under Section 1983, whether or not these cases correctly apply accrual principles to such actions does not matter here, since petitioner has not pressed his malicious prosecution theory in this Court. Hence these cases have little bearing on the question that petitioner does press.[3]

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[3] Whether a Section 1983 cause of action exists for malicious prosecution is very much an open question. See *Albright v. Oliver*,

Jackson v. Vannoy, 49 F.3d 175 (5th Cir.) (per curiam), cert. denied, 116 S. Ct. 148 (1995), is also quite different from this case. There, the plaintiff's parole had been revoked solely on the basis of his arrest, and hence a claim that he had been illegally arrested would necessarily have impugned the validity of his parole revocation. See *id.* at 176-77. In *Alvarez-Machain v. United States*, 96 F.2d 1246 (9th Cir. 1996), the plaintiff's claims also depended on the validity of his arrest. There, the plaintiff challenged his abduction in a foreign country by federal agents who brought him to the United States to face charges, claiming that they had done so in violation of an extradition treaty. That claim quite plainly went to the validity of the charges brought against him. See *id.* at 1250-51. Here, as we explain above, the unconstitutionality of petitioner's arrest or interrogation would not have been a defense in the criminal case against him. Hence, cases in which the plaintiff's attack on his arrest, if sustained, would necessarily require his release from custody have no bearing on this case.

Three of the other cases on which petitioner relies provide no basis to believe that there is a conflict between the law in the circuits that decided them and the law in the Seventh Circuit. Two of these decisions are unpublished, nonprecedential opinions of the Ninth Circuit, which contain little analysis or reasoning and even lack helpful descriptions of the plaintiffs' claims. See *Newman v. Jensen*, 1997 WL 665701 (9th Cir. 1997); *Helmet Law Defense League v. California Highway Patrol*, 1997 WL 547956 (9th Cir. 1997). Similarly, in *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995) (per curiam), the pro se complaint was "confusing." *Id.* at 746. The court re-

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510 U.S. at 275 (plurality opinion). In this case, the court of appeals rejected petitioner's malicious prosecution theory by concluding that he had alleged no violation of federal law other than his time-barred claims for arrest without probable cause and the use of excessive force. See Pet. App. 13a, 16a. Petitioner does not quarrel with that holding in this Court.

manded the case to the district court because it could not tell if Mackey's claims necessarily impugned the validity of his conviction. *Ibid.*

As for petitioner's three remaining cases, we acknowledge that these decisions are inconsistent with the holding below. In each case, the court concluded that allegations that an unreasonable seizure produced evidence that was important to the prior criminal case against the plaintiff stated a cause of action that would not accrue until the plaintiff's conviction were vacated. See *Hudson v. Hughes*, 98 F.3d 868, 871-72 (5th Cir. 1996); *Schilling v. White*, 58 F.3d 1081, 1085-85 (6th Cir. 1995); *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir.) (per curiam), cert. denied, 116 S. Ct. 54 (1995). With respect, we think these decisions misapprehend the Court's reasoning in *Heck* as well as the teaching from other of the Court's cases that allegations of an unreasonable search or seizure do not invalidate a subsequent charge or conviction and, thus, that these allegations are not necessarily inconsistent with an outstanding judgment under which an individual remains in custody.

What is more, the rationale for the view that claims of false arrest and excessive force accrue when the constitutional violation occurs and not when subsequent criminal proceedings are terminated has yet to be reexamined by these other circuits in light of the forceful explication of its position by the Seventh Circuit in a trio of its recent opinions, *Booker v. Ward*, the decision below, and the even more recent decision in *Gonzalez v. Entress*, 133 F.3d 551 (7th Cir. 1998), in which the court addressed at some length the Sixth Circuit's reasoning in *Schilling*, explaining:

> Part of *Schilling*'s rationale—that *Heck* applies to persons detained pending trial, as well as to those who have already been convicted—is unexceptional. But to say that *Heck* "applies" is not to say that it requires dismissal of a suit seeking damages for the

> arrest or search, as opposed to damages for wrongful conviction. Wrongful invasions of privacy are actionable in trespass, and wrongful detentions actionable under state law and the fourteenth amendment, no matter what happens to a criminal prosecution. Suppose a person says something like "I was arrested without probable cause and spent a night in jail until my wife came up with bail money." That injury is compensable whether or not the person is later convicted—indeed, whether or not he is later prosecuted.

Id. at 553 (citation omitted). Accordingly, other circuits may reconsider their view in light of the Seventh Circuit's recent and cogent explanations in support of its rule.

3. Petitioner advances only one policy argument in support of his position, suggesting that the rule embraced below can lead to inconsistent results or otherwise interfere with ongoing state proceedings if a state criminal proceeding addresses the merits of the defendant's Fourth Amendment claim at the same time that that individual is forced to prosecute the same claim in a Section 1983 action in order to satisfy the limitations period. See Pet. 7-8. The likelihood that the state and federal courts will reach truly inconsistent results is overstated at best, since a federal court is obligated to give a state court's findings and judgment the same preclusive effect as they would receive in the courts of the rendering state. See, *e.g.*, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). And the Court anticipated parallel proceedings in *Heck*, and explained that when a Section 1983 action is brought while a related state prosecution is pending, the federal action can be stayed if it would interfere with ongoing state proceedings. See 512 U.S. at 487 n.8.

Indeed, it is petitioner's position that leads to imprudent results. On petition's view, a Section 1983 plaintiff can wait for many years before bringing his claims relating to his arrest and interrogation, since it may well take many years before the state courts vacate a conviction resting

on evidence obtained in violation of the Fourth Amendment.[4] The problems that inhere in litigating such stale claims, when memories have faded and records have been lost or destroyed, should be obvious. Such a delay is unavoidable in cases like *Heck* where the invalidity of a conviction is an element of the constitutional violation, such as cases in which the plaintiff contends that his conviction rests on the suppression of exculpatory evidence and accordingly must show not only that exculpatory evidence was suppressed but that it materially contributed to his conviction. See, *e.g.*, *Kyles v. Whitley*, 115 S. Ct. 1555, 1565-68 (1995). But such a result is surely unwarranted here. When a plaintiff claims that he has been arrested without probable cause or subjected to excessive force during the course of that arrest, all the evidence necessary to litigate the constitutionality of the police conduct is available as soon as that conduct occurs. There is accordingly no justification for delaying litigation about such conduct for many years, a consequence of the rule petitioner urges.

Moreover, petitioner's insistence on a case-by-case inquiry into whether unconstitutionally obtained evidence is necessary to the prosecution is especially difficult to apply if the plaintiff chooses to bring suit while charges against him are still pending: in such cases it will be impossible to know what evidence will be admitted at trial and how central any tainted evidence may be to the prosecution's case. Thus there is no basis under petitioner's test to determine if such a claim is barred by *Heck*. This practical problem also argues against petitioner's reading of *Heck* as requiring case-by-case analysis of whether tainted evidence is necessary to support a charge or conviction. When the accused has not been tried or convicted, it sim-

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[4] For example, in *Booker v. Ward* the plaintiff brought suit within two years of the date that his conviction was vacated, but more than seven years after his allegedly unconstitutional seizure. See 94 F.3d at 1056.

ply cannot be said that an alleged Fourth Amendment violation would necessarily taint the charge or a subsequent conviction. Petitioner's eagerness to revise stale claims thus overlooks *Heck*'s primary purpose of barring claims that are inconsistent with an outstanding state-court judgment. Under petitioner's approach, there will be no way to determine which claims of accused persons facing trial have accrued, and which must await a favorable disposition in state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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